# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

## No. 339

SOUTHERN UTILITIES COMPANY, PETITIONER,

vs.

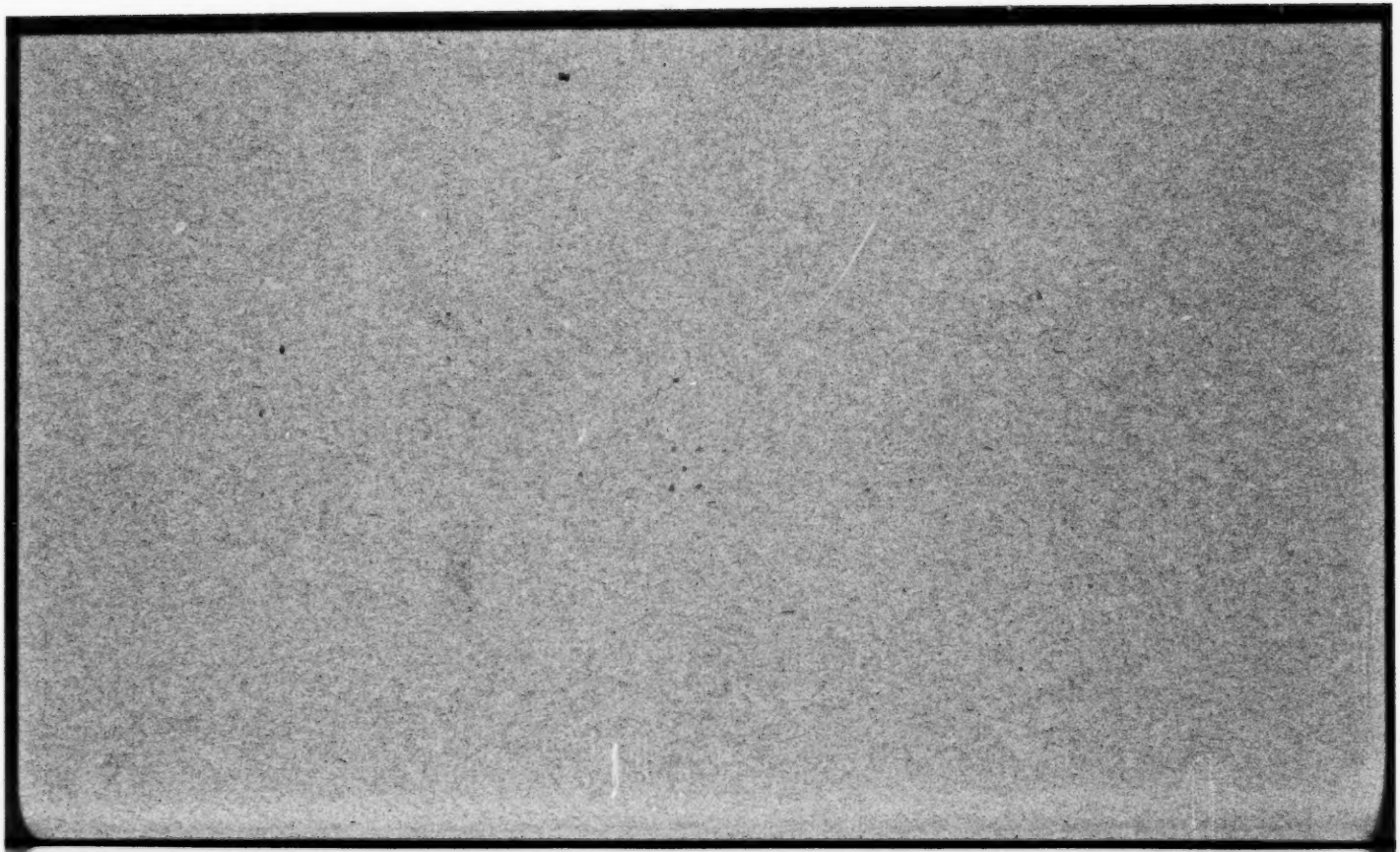
CITY OF PALATKA

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED MARCH 24, 1924

CERTIORARI GRANTED APRIL 21, 1924

(30,225)



# (30,225)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1924.

# No. 339

SOUTHERN UTILITIES COMPANY, PETITIONER,

*vs.*

CITY OF PALATKA

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. 1] Caption—Omitted

IN THE

**CIRCUIT COURT OF FLORIDA, EIGHTH JUDICIAL CIRCUIT, IN AND FOR PUTNAM COUNTY**

In Chancery

CITY OF PALATKA, a Municipal Corporation Existing under the Laws of the State of Florida, Complainant,

vs.

SOUTHERN UTILITIES COMPANY, a Corporation under the Laws of the State of Florida, Defendant

Bill for Injunction and Other Relief

BILL OF COMPLAINT

To the Honorable A. V. Long, judge of said court:

City of Palatka, a municipal corporation existing under the laws of the State of Florida, complainant, brings this its bill against Southern Utilities Company, a corporation under the laws of the State of Florida, defendant and thereupon complaining says:

[fol. 2] 1. The complainant is a municipal corporation in Putnam County, Florida, organized and existing under and by virtue of the acts of the Legislature of the State of Florida.

2. Southern Utilities Company, defendant, is a corporation organized and existing under the laws of the State of Florida, having its principal place of business in the City of Kissimmee, County of Osceola, State of Florida, and having another of its places of business and its principal operating offices in the City of Palatka, County of Putnam, State of Florida; that said defendant is a public service corporation vested with all the rights, powers and privileges, and upon which is imposed all the duties, obligations and liabilities of a public service corporation under the laws of the State of Florida.

3. Complainant further represents, that on the 21st day of August, A. D. 1914, the City of Palatka, complainant, by ordinance duly and legally passed and adopted by the City Council of said City of Palatka, and approved by the Mayor of said City, gave and granted to the Palatka Gas Light & Fuel Company, a corporation existing under and by virtue of the laws of the State of Florida, and having its principal place of business in the City of Palatka, Putnam County, Florida, and its successors and assigns, the right and privilege to construct, own, operate and maintain in the City of Palatka, Florida, a plant or plants for the manufacture, sale and distribution of electricity,

gas and other illuminants or products for light, power and fuel; and to lay mains, pipes and fixtures under the streets, lanes, alleys, sidewalks and bridges of said city for the distribution of gas, and to erect poles, lamp posts, wires and appliances for the transmission of electricity and power under, through, over and across the said streets, lanes, alleys, sidewalks and bridges of said City for a period of thirty [fol. 3] years from said date.

4. Complainant further represents that as a consideration for the granting of such right and privilege by said city of Palatka to said Palatka Gas Light & Fuel Company and its successors and assigns, said Palatka Gas Light & Fuel Company covenanted and agreed with said City of Palatka as an incident to said grant referred to in paragraph three thereof, that the rates to be charged in the City of Palatka for commercial electric lighting should not be more than ten cents per kilowatt, meter measurement for the first ten years and not more than nine cents per kilowatt thereafter, meters to be furnished and kept in repair by the grantees at its own expense, and the minimum charge should not be more than one dollar and fifty cents per month.

5. Complainant further represents that said Palatka Gas Light & Fuel Company accepted said ordinance or grant, and all the covenants and conditions therein contained, in its entirety, by instrument in writing, and by constructing, owning, operating and maintaining in said City of Palatka, a plant or plants for the manufacture, sale and distribution of electricity, gas and other illuminants or product for light, power and fuel, and erecting poles, lamp posts, wires and appliances for the transmission of electricity and power under, through, over and across the said streets, lanes, alleys, sidewalks and bridges of said City of Palatka.

A certified copy of said ordinance is hereto attached, marked "Exhibit A" and made a part of this bill of complaint by reference to the same extent and for all purposes as if set out herein in full.

A certified copy of instrument accepting said grant is hereto attached, marked "Exhibit B" and made a part of this bill of complaint by reference to the same extent and for all purposes as if set out herein in full.

6. Complainant further represents, that on the 1st day of Janu- [fol. 4] ary, A. D. 1917, the Palatka Gas Light & Fuel Company, a corporation as aforesaid, then enjoying the rights and privileges granted by said City of Palatka and accepted by it, and operating and carrying on the business contemplated by said grant, assigned and transferred the rights and privileges so granted to it by said City of Palatka as aforesaid to the Palatka Public Service Company, a corporation under the laws of the State of Florida, with principal place of business in the City of Palatka, Putnam County, Florida.

7. Complainant further represents that on the 1st day of November, A. D. 1917, the Palatka Public Service Company, a corporation as aforesaid, then enjoying the rights and privileges granted by said City of Palatka to and accepted by said Palatka Gas Light & Fuel

Company, and assigned and transferred to it by said Palatka Gas Light & Fuel Company, and operating and carrying on the business contemplated by said grant and assignment thereof, transferred and assigned said rights and privileges granted and assigned to it as aforesaid to the Southern Utilities Company, a corporation as aforesaid, defendant.

8. Complainant further represents, that said defendant, under said assignment from Palatka Public Service Company, a corporation as aforesaid, to it, accepted said ordinance or grant, and all the conditions, covenants and agreements therein contained, in its entirety, and under said ordinance or grant as assigned to it, has constructed, owned, operated and maintained in the City of Palatka, Florida, a plant for the manufacture, sale and distribution of electricity, and has erected poles, lamp posts, wires and other appliances for the transmission of electricity and power under, through, over and across the streets, lanes, alleys, sidewalks and bridges of said City, and has manufactured, sold and distributed electricity in said City of Palatka from the 1st day of November, A. D. 1917, until the present time, to the City of Palatka for lighting the streets, public places and public [fol. 5] buildings of said City and furnished electricity for light and power to the inhabitants of said City who desired to procure the same, and who paid therefor at the rate charged by said defendant, and enjoyed and exercised all the rights and privileges granted by and incident to said ordinance, and continues to enjoy and exercise all said rights and privileges at this time.

9. Complainant further represents that notwithstanding the conditions and covenants contained in said ordinance, and the duty of said defendant to furnish the City of Palatka and the inhabitants thereof electricity for lighting and power under the terms of said ordinance, the defendant has refused and neglected and still refuses and neglects to comply with the conditions and covenants in said ordinance contained and has charged and collected each month from the inhabitants of said City of Palatka and patrons of said defendant in said City of Palatka, and continues to charge and collect each month from the inhabitants of said City of Palatka and patrons of said defendant in said City of Palatka, for commercial electric lighting, thirteen cents per kilowatt, meter measurement, and a minimum charge of one dollar and fifty cents per month; and complainant says that it has protested to said defendant against such charge in excess of the rate prescribed in said ordinance as incident to the grant of the rights and privileges therein and thereby granted, and repeatedly notified and requested said defendant to comply with the covenants and conditions of said ordinance, and defendant has refused, and still refuses and neglects so to do, persisting in violating the same, and defying the complainant in its efforts to obtain a compliance therewith.

Wherefore complainant, being without remedy in the premises save in a court of equity, prays this Honorable Court to take juris-

diction of the subject matter and the parties to this bill of complaint, and to the end that Southern Utilities Company, a corporation as aforesaid, who is made a party defendant to this bill, may be re- [fol. 6] quired to make full and direct answer to the same, but not under oath, answer under oath being hereby expressly waived; that Southern Utilities Company, a corporation, defendant, may be restrained and enjoined by decree of this Court from charging and collecting from the inhabitants of said City of Palatka and patrons of said defendant in the City of Palatka, said rate of thirteen cents per kilowatt, meter measurement, for commercial electric lighting, or any rate for such commercial electric lighting in the City of Palatka in excess of the rate set out as incident to the grant of the rights and privileges contained in said ordinance, to-wit: the rate of ten cents per kilowatt, meter measurement, that a temporary injunction or restraining order be issued, without notice, out of this Honorable Court, of like character, directed to the defendant, and upon final hearing said temporary injunction be made permanent, and for such other and further relief in the premises as equity may require and to this Court may seem meet and proper.

May it please your Honor to grant the State's most gracious writ of subpœna or summons in Chancery directed to Southern Utilities Company, a corporation under the laws of the State of Florida, defendant, requiring it on a day certain and under a certain penalty, to be and appear before this Honorable Court, and then and there full, true and direct answer make to the allegations herein contained, and to stand to and abide by such order and decree in the premises as to your Honor shall seem meet and agreeable to equity, and complainant will ever pray, etc.

Thos. B. Dowda, W. P. Dineen, & J. J. Canon, Solicitors for Complainant.

Jurat showing the foregoing was duly sworn to by A. M. Steen: omitted in printing.

---

[fol. 7] STATE OF FLORIDA,
County of Putnam:

AFFIDAVIT OF A. M. STEEN

Personally appeared before me, an officer authorized under the laws of the State of Florida to administer oaths, A. M. Steen, who, after being by me first duly sworn, on oath says that he is Mayor of the City of Palatka, a municipal corporation in Putnam County, Florida, and as such officer is authorized to make this affidavit for and on behalf of said City of Palatka, complainant; that the interest of said City of Palatka, complainant, and the inhabitants of said City, will be unduly prejudiced if the injunction in this cause is not issued immediately or without notice to the defendant, Southern Utilities, a corporation; that said defendant, Southern Utilities Company, a corporation, will charge and collect on the 1st day of Aug-

ust, A. D. 1922, from the inhabitants of said City of Palatka and patrons of said defendant in the City of Palatka, the sum of Thirteen cents per kilowatt, meter measurement, for electric lighting consumed by the inhabitants of said City and patrons of the de-[fol. 8] fendant in said City during the month of July, 1922, the same being three cents per kilowatt, meter measurement, in excess of the contract rate set out in the ordinance of said City under which the defendant is now operating, or in default of payment of such excessive rate, said defendant, will suspend furnishing electric lighting to the inhabitants of said City and patrons of the defendant in said City, if not enjoined and restrained from so doing, and will continue such excessive rate and charge during the pendency of this suit, if not restrained or enjoined as aforesaid.

A. M. Steen.

Sworn to and subscribed before me this 27 day of July, A. D. 1922. W. A. Williams, Jr., Notary Public, State of Florida at Large. My commission expires July 13th, 1925. (Notarial Seal.)

---

[fol. 9] EXHIBIT "A" TO BILL OF COMPLAINT

An Ordinance, to Grant to the Palatka Gas Light & Fuel Company, Its Successors and Assigns, Certain Rights, Franchise and Privileges

Be it ordained by the Mayor and City Council of the City of Palatka, Fla.:

Section 1. That the Palatka Gas Light & Fuel Company, a Corporation created and organized under the laws of the State of Florida in the year 1914, its successors and assigns, hereinafter called the Grantees are hereby given and granted a Franchise, Right, Privilege and Authority, to construct, own, operate and maintain, in the City of Palatka, Florida, plant or plants for the manufacture, sale and distribution of electricity, gas and other illuminants or products for light, power and fuel and the said Grantees, are hereby authorized and empowered to lay such mains, pipes and fixtures, under the streets, lanes, alleys, sidewalks, and bridges of said City for the distribution of gas, and to erect all necessary poles, lamp posts, wires and appliances, for the transmission of electricity and power, along, through, over and across the said streets, lanes, alleys, sidewalks and bridges of said City for the period of thirty years from the passage of this ordinance, provided, however, that said Grantees within thirty days from the passage of this ordinance, shall file with the City Clerk, its written acceptance of this ordinance.

Section 2. All poles used by the Grantees shall be neat and symmetrical and the location of poles and wires within the City limits and the maintenance of same shall be under the supervision of the

City Council and in accordance with its instructions, and Grantees shall replace and properly repair any sidewalks, pavements or streets that may be disturbed by Grantees, at its own expense, and upon the failure of the Grantees so to do after ten days' notice in writing shall have been given by the Mayor or City Clerk of the City, to said Grantees, the City may repair such portions of the sidewalks, pavement or street, that may have been disturbed by said [fol. 10] Grantees, and collect the cost so incurred from the Grantees.

Section 3. The rates to be charged in the City of Palatka for commercial electric lighting shall not be more than ten cents per kilowatt, meter measurement, for the first ten years, and not more than nine cents per kilowatt thereafter, meter to be furnished and kept in repair by the Grantees herein at their expense, and the minimum charge shall be not more than one dollar and fifty cents per month.

Section 4. The rates to be charged in the City of Palatka for electric motor service shall not be more than the following rates: Meter measurement. Two hundred kilowatts or less, eight cents per kilowatt, all in excess of two hundred kilowatts up to five hundred kilowatts, seven cents per kilowatt; all in excess of five hundred kilowatts up to one thousand kilowatts, six cents per kilowatt; all in excess of one thousand kilowatts up to eighteen hundred kilowatts, five cents per kilowatt; all in excess of eighteen hundred kilowatts, four cents per kilowatt; provided that the said Grantees shall not be compelled to furnish electric power to any motor consumer for less than twenty-two dollars per year per rated horsepower of motor as shall be determined by the said Grantees. Meters to be furnished and kept in repair by the Grantees herein at their expense.

Section 5. The rates to be charged in the City of Palatka for electric street lighting purposes shall not exceed the following rates, for all night schedule.

2,000 candle power lights, $75.00 per annum.
1,500 candle power lights, $65.00 per annum.
100 candle power lights, $25.00 per annum.
80 candle power lights, $22.00 per annum.
60 candle power lights, $21.00 per annum.
40 candle power lights, $20.00 per annum.

Section 6. The rates to be charged in the City of Palatka for gas shall not exceed one dollar and sixty cents per thousand cubic feet, [fol. 11] meter measurement, meters to be furnished and kept in repair by the Grantees herein at their expense, and the minimum charge shall not be more than one dollar per month.

Section 7. The Grantee shall not be required to furnish electricity or gas for light or power to any consumer who shall refuse to comply with any reasonable rules and regulations adopted by said company, for the conduct of its business.

Section 8. The Grantees shall at all times be subject to the City ordinances now in existence and which may be hereafter passed

relative to the use of the streets in the City of Palatka and said Grantees and their agents and employees shall be under the same police regulations and liable to the same fine and imprisonment as other persons violating the ordinances of the City of Palatka, provided such ordinances shall in no way abridge or impair the franchise right and privileges hereby granted.

Section 9. Said Grantees shall indemnify against and assume all liability for any and all damages that may be suffered by said City to its property, or to which said City may become liable in any manner for damage to the person or property of others on account of or through the carelessness or negligence of said Grantees, their officers, employes, agents or servants, or on account of the failure of said Grantees to comply with any ordinance of said City relative to the use of its streets.

Section 10. The said Grantees, shall, within nine months from date of this ordinance, so enlarge, extend, improve and equip its electric light plant in the City of Palatka, that it will then be capable of furnishing all electric lights and power required under the terms of this ordinance that may be necessary to then supply the demand and requirement of the business and people of the City of Palatka then attached and from time to time shall so continue to improve and extend said plant as to meet the growing demand of the business and people of the City of Palatka, so that said plant [fol. 12] shall at all times be capable of providing ample and sufficient electricity, light and power for the City of Palatka; and the said Grantees shall within nine months begin the operation of said electric plant and shall thereafter operate the same on a twenty-four hour per day schedule, and continue so to operate the same day and night, thereby giving a continuous electric current for all necessary purposes during the life of this franchise, excepting failures caused by the act of God, war, strikes and unavoidable accidents.

Section 11. The said Grantees shall provide and keep in repair one cross arm on each pole when requested by the City Council, for the free use of the City of Palatka in operating a police or fire alarm system or both and shall also provide and equip the power plant of the grantees herein with a fire alarm whistle, and shall upon notice by the City of its authorities, cause to be blown a fire alarm upon said fire alarm whistle indicating the ward within which a fire may occur.

Section 12. The City of Palatka gives and grants the franchise, rights and privileges herein set forth, reserving the right and requiring the grantees as a condition precedent to the taking effect of this grant to give and grant to the City of Palatka the right and privilege at the period of ten, twenty and thirty years from the passage of this ordinance to purchase said plant or plants used under and in connection with the franchise and rights hereby granted in accordance with the laws of the State of Florida, at a valuation of the property real and personal which valuation shall be fixed by arbi-

tration as may be provided by law, provided however, that should the City elect to purchase at the ten or twenty year period, the Grantees shall have three months' notice of such intention on the part of the City to do so.

Section 13. The said Grantees shall, whenever requested by the said City, extend its wires and install street lights at such places within the City of Palatka as the said City may require, provided the said Grantees shall be paid for at least one street light for every [fol. 13] seven hundred and fifty feet of extension.

Section 14. A substantial failure on the part of the Grantees herein to comply with the terms and provisions of this ordinance shall work a forfeiture thereof, provided, however, that there shall be no forfeiture unless declared by the said City, for legal cause on substantial ground.

Section 15. That the written acceptance of the provisions in this ordinance by the Grantees as herein provided shall be taken and construed to be a surrender by said Grantees of all rights, privileges, franchises, and powers granted to said grantees under and by virtue of an ordinance entitled "An Ordinance to Grant Certain Privileges to the Palatka Gas Light & Fuel Company," passed in open Council Oct. 20th, 1885, and passed by the Council over the Mayor's veto, October 27th, 1885.

Section 16. That the said Grantees shall furnish to the said City of Palatka free of charge, lights for the City Hall Building.

Section 17. The said City of Palatka does hereby reserve unto itself the right and privilege to at any time erect, install and operate an electric light and gas plant or plants in said City.

Section 18. All ordinances and part of ordinances in conflict with the provisions of this ordinance be and the same are hereby repealed.

Passed in open council this 21st day of August, A. D. 1914.
J. H. Yelverton, Jr., President City Council. (Seal.)

Attest: W. A. Williams, City Clerk.

Approved this 21st day of August, A. D. 1914. S. J. Kennerly, Mayor.

[fol. 14] STATE OF FLORIDA,
City of Palatka:

I, R. C. Howell, City Clerk of the City of Palatka, in Putnam County, Florida, hereby certify that the above and foregoing is a true and correct copy of what it purports to be from the face thereof, as the same appears of record in Ordinance Book No. 2 of said City.

In testimony whereof, I have hereunto set my hand and affixed the seal of said City of Palatka, this 27th day of July, A. D. 1922.

R. C. Howell, City Clerk, City of Palatka, Putnam County, Florida. (Seal.)

[fol. 15] EXHIBIT "B" TO BILL OF COMPLAINT

This indenture, made and executed this 17th day of September, A. D. 1914, by and between Palatka Gas Light & Fuel Company, a corporation created and organized under the laws of the State of Florida, in the year 1914, having its principal place of business in Putnam County, Florida, party of the first part, and City of Palatka, a municipal corporation under the laws of the State of Florida, party of the second part.

Witnesseth: that whereas the City of Palatka by an ordinance entitled "An Ordiance to Grant to the Palatka Gas Light & Fuel Company, its successors and assigns, certain rights, franchises and privileges, passed in open Council the 21st day of August, A. D. 1914, approved the 21st day of August, A. D. 1914, by the Mayor of the City of Palatka, granted to the Palatka Gas Light & Fuel Company, its successors and assigns, certain rights, franchises and privileges, and therein required the Palatka Gas Light & Fuel Company, as a condition precedent to the taking effect of the said ordinance, to give and grant to the said City of Palatka, the right and privilege at the periods of ten, twenty and thirty years, to purchase said plant or plants used under or in connection with the franchises and rights therein granted in accordance with the laws of the State of Florida.

And that whereas, in section 1 of said ordinance, it was provided that the said Palatka Gas Light & Fuel Company should within thirty days from passage of said ordinance, file with the City Clerk its written acceptance of said ordinance.

Now, therefore, the said Palatka Gas Light & Fuel Company has given and granted and does by this instrument give and grant to the municipality of the City of Palatka, the right and privilege at the periods of ten, twenty and thirty years from the passage of said ordinance to purchase the said gas and electric plants, or other property used under or in connection with such franchise or rights, or [fol. 16] such part of such property as the municipality may desire to purchase at a valuation of the property real and personal, desired, which valuation shall be fixed by arbitration as may be provided by law, provided, however, that should the City of Palatka elect to purchase at the ten or twenty year period, the said Palatka Gas Light & Fuel Company, its successors or assigns, shall have three months' notice of such intention on part of said City of Palatka so to do; and the said Palatka Gas Light & Fuel Company does hereby accept the said ordinance and files this its written acceptance thereof.

In witness whereof, the Palatka Gas Light & Fuel Company has caused its corporate name to be signed to this instrument, by its President thereunto duly authorized, and its corporate seal affixed and attested by its Secretary thereunto duly authorized, and for and in behalf of said corporation and as its act and deed, the day and year herein first above written.

Palatka Gas Light & Fuel Company, by G. Loper Bailey, President.

Attest: R. West Bailey, Secretary. (Corporate Seal.)

Signed, sealed and delivered in the presence of the undersigned witnesses: Fred T. Merrill, M. Ramsaur.

STATE OF FLORIDA,
County of Putnam:

Personally appeared before me G. Loper Bailey and R. West Bailey, to me well known, who acknowledged to and before me that they executed the foregoing instrument as President and Secretary of Palatka Gas Light & Fuel Company for and in behalf of said [fol. 17] Palatka Gas Light & Fuel Company and as its act and deed, and that they were respectively thereunto duly authorized.

In witness whereof, I hereunto set my hand and notarial seal at Palatka, Florida, this 17th day of September, A. D. 1914.

Fred T. Merrill, Notary Public, State of Florida at Large. My commission expires on the 25th day of March, A. D. 1917. (Notarial Seal.)

STATE OF FLORIDA,
County of Putnam:

I, R. C. Howell, City Clerk of the City of Palatka, in Putnam County, Florida, hereby certify that the above and foregoing is a true and correct copy of what it purports to be from the face thereof, as the same appears of file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said City of Palatka this 27th day of July, A. D. 1922.

R. C. Howell, City Clerk City of Palatka, Putnam County, Florida. (Seal of City of Palatka.)

---

[fol. 18] IN CIRCUIT COURT OF PUTNAM COUNTY

SUMMONS

On July 27, 1922, a subpœna in chancery was duly issued directed to the defendant.

On July 28, 1922, the said subpœna was duly served upon the defendant, and the defendant thereafter filed its appearance.

[File endorsement omitted.]

---

IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

CERTIFICATE OF DISQUALIFICATION—Filed July 28, 1922

This cause coming on to be heard upon the application of complainant for temporary injunction, and it appearing that the Judge of this Court is disqualified to act upon said application or entertain

[fol. 19] any proceedings in this cause, in this, that the Judge of this Court is an inhabitant of the City of Palatka, complainant, and a consumer of electric lighting in said City of Palatka, and would be directly benefited or affected by the granting or denial of said injunction; therefore, upon consideration thereof,

It is ordered and adjudged that the Judge of this Court be and he is hereby declared disqualified to act upon said application or entertain further proceedings in this cause, and the parties hereto are hereby granted leave to proceed in this cause as by statute in such case made and provided.

Done in Chambers at Palatka, Florida, in said Circuit, this 28 day of July, A. D. 1922.

A. V. Long, Judge.

---

In Circuit Court of Putnam County

Temporary Restraining Order

On July 28, 1922, Honorable Daniel A. Simmons, Judge of the Circuit Court for Duval County, Florida, as Judge pro hæc vice, made an order for an injunction temporarily enjoining and restraining the defendant in accordance with the prayer of the bill of complaint, which said order is in the words and figures as follows:

This cause coming on for hearing before me upon application of complainant for a temporary injunction, Hon. A. V. Long, Judge of said Court, having certified his disqualification, it is ordered that the hearing of said application be and is set for August 28, 1922, at 10:00 A. M. It is further ordered that the respondent, Southern Utilities Company, a corporation, be and is temporarily, and until after the said hearing, restrained from collecting from inhabitants of the City of Palatka and patrons of the said respondent in the City of Palatka, more than ten (10) cents per kilowatt, meter measurement for electricity for commercial electric lighting, including the lighting of homes.

This order shall become effective upon the furnishing by the complainant of a good and sufficient bond in the sum of one thousand [fols. 20-22] dollars ($1,000.00) to be approved by the clerk of the Circuit Court of Putnam County, conditioned to pay to respondent such costs and damages as it may sustain by the improper issuance of this order in case the same shall be hereafter vacated, or the bill of complaint dismissed.

Done this July 28th, 1922.

Dan'l A. Simmons, Judge pro hæc vice.

Received the order on the reverse side hereof this July 29th, 1922, and executed the same on July 29th, 1922, in Putnam County, Florida, upon the defendant, Southern Utilities Company, a corporation, by delivering a true copy thereof to A. W. Houston, Vice-President and General Manager of said corporation, resident in Putnam County, Florida, in the absence of the President of said cor-

poration, at the same time showing him the original and explaining to him the contents thereof.

Done in Putnam County, Florida, this July 29th, 1922.

P. M. Hagan, Sheriff, by W. T. Minton, Deputy Sheriff

---

Bond on Temporary Restraining Order for $1,000—Approved and filed July 29, 1922; omitted in printing

---

[fol. 23] In Circuit Court of Putnam County

[Title omitted]

Temporary Injunction

To Southern Utilities Company, a corporation, Greeting:

Whereas, the City of Palatka, a municipal corporation under the laws of the State of Florida, has exhibited its bill of complaint in the Circuit Court of the Eighth Judicial Circuit of Florida, in and for Putnam County, in Chancery, on the 27th day of July, A. D. 1922, against you, praying to be relieved touching the matters therein complained of; and,

Whereas, by an order of Court, dated the 28th day of July, A. D. 1922, it was ordered that the hearing on the application for temporary injunction be and is set for August 28th, 1922, at 10:00 a. m.; and,

Whereas, in and by said order it was further provided, that the respondent, Southern Utilities Company, a corporation, be and is temporarily and until after the said hearing restrained from collecting from inhabitants of the City of Palatka and patrons of the said respondent in the City of Palatka more than ten (10) cents per kilowatt, meter measurement, for electricity for commercial electric lighting, including the lighting of homes, upon said City making bond in the sum of $1,000.00 to be approved by me.

[fol. 24] Now, therefore, you will take notice that I have this day approved bond submitted and filed by the City of Palatka, a municipal corporation as aforesaid, complainant, in the sum of one thousand dollars, with the American Surety Company, of New York, as surety, and that under and by the terms of said order of Court, dated the 28th day of July, A. D. 1922, you are temporarily and until after the said hearing restrained from collecting from inhabitants of the City of Palatka and patrons of the Southern Utilities Company, a corporation, in the City of Palatka more than ten (10) cents per kilowatt, meter measurement, for electricity for commercial electric lighting, including the lighting of homes.

Witness the Honorable R. J. Hancock, Clerk of said Court, and the seal of said Court, this 29th day of July, A. D. 1922.

R. J. Hancock, Clerk Circuit Court, Putnam County, Florida, by W. A. Williams, Jr., Deputy Clerk. (Court Seal.)

Received this order this 29th day of July, 1922, and executed the same on the 29th day of July, 1922, upon the defendant Southern Utilities Company, a corporation, by delivering a true copy hereof to A. W. Houston, Vice-President and General Manager of said corporation, resident in Putnam County, Floria, in the absence of the President of said corporation, at the same time showing him this original and explaining to him the contents hereof.

Done in Putnam County, Florida, this 29th day of July, 1922.

P. M. Hagan, Sheriff, by W. T. Minton, Deputy Sheriff.

---

[fol. 25] IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

MOTION TO DISSOLVE TEMPORARY INJUNCTION AND AFFIDAVIT THERETO—July 31, 1922

Comes now the defendant, Southern Utilities Company, by counsel and moves the court to dissolve the temporary injunction or restraining order granted in above entitled cause of action on July 28, 1922 and as grounds for said motion says:

1. The allegations in the bill of complaint are not sufficient to warrant the granting of the temporary injunction.

2. The affidavit attached to the bill of complaint does not allege facts sufficient to warrant the granting of the temporary injunction without notice to defendant.

3. The bond required by the temporary injunction is not sufficient to protect the defendant.

4. The order does not show by what authority the Judge granted same or that he was in his circuit when same was signed.

W. B. Crawford, Attorney for Defendant.

[fol. 26] STATE OF FLORIDA,
Putnam County, ss:

Before the undersigned authority this day personally came A. W. Houston, who after being duly sworn deposes and says that he is Vice President & General Manager of the Southern Utilities Company, a Florida corporation, defendant in that certain cause pending in the Circuit Court of the Eighth Judicial Circuit of Florida, in and for Putnam County, in which the City of Palatka is Complainant, and the Southern Utilities Company is Defendant; that as such Officer of said Company he has active management of the operation of said Company and full custody of all of its records; that the difference between the rate of 10 cents per kilowatt hour and 13 cents per kilowatt hour for electricity furnished by said Southern Utilities Company to its patrons in the City of Palatka for one

month is approximately Seven Hundred and Fifty ($750.00) Dollars; that if the temporary Injunction granted in the Court herein described on July 28th, 1922 is dissolved on the date set for the hearing of same on August 28th, 1922, the approximate loss to said Southern Utilities Company by reason of said Injunction restraining said Company from collecting the present rate of 13 cents per kilowatt hour for electricity furnished the patrons of Palatka, Florida, the loss will be approximately Fifteen Hundred ($1,500.00) Dollars in addition to other expenses incident to the continuing of said temporary Injunction, which must be paid by the Southern Utilities Company; that said rate of 13 cents per kilowatt hour for electricity furnished has been charged by said Company and collected from the patrons of said Company for a period of six (6) months since said City of Palatka alleges said Company had no right to charge the same, and that no action has been taken by said Plaintiff Company prior to the issuance of said Injunction of July 28th, 1922, and that said Injunction was issued without any notice whatsoever to said defendant Company, and said deponent further [fol. 27] says that irreparable injury will not result to the patrons of said defendant Company if said Injunction should be dissolved, and that said City of Palatka, and the patrons of said defendant Company have had time to give notice to said defendant Company of its intention to apply for said Injunction.

A. W. Houston.

Sworn to and subscribed before me this the 29th day of July 1922. E. W. Neate, Notary Public. (Seal.)

[File endorsement omitted.]

---

In Circuit Court of Putnam County

[Title omitted]

Order Overruling Motion to Dissolve Temporary Injunction —July 31, 1922

This cause coming on to be heard before the undersigned, the Judge of the Seventeenth Judicial Circuit of Florida, in and for [fol. 28] Orange County, Florida, Honorable A. V. Long, Judge of the Eighth Judicial Circuit of Florida having certified his disqualification, upon the motion of the defendant to dissolve the temporary restraining order heretofore granted by the Honorable Daniel A. Simmons and the same having been argued by the solicitors for the respective parties, and the Court being fully advised in the premises, It is

Ordered that said motion be, and the same is hereby denied.

It is further ordered that the complainant, City of Palatka, a municipal corporation, furnish additional bond within three days from

the date hereof, running to the defendant in the sum of One Thousand Dollars, to be approved by the Clerk of the Circuit Court for Putnam County, Florida, conditioned to pay to the defendant such costs and damages as it may sustain by the improper issuance of said temporary restraining order, in case the same shall be hereafter vacated, or the bill of complaint dismissed.

Done in chambers at Orlando, Orange County, Florida, in said Seventeenth Judicial Circuit of Florida, this 31 day of July, A. D. 1922.

C. O. Andrews, Judge Seventeenth Judicial Circuit of Florida.

---

[fol. 29] Bond on Temporary Injunction for $1,000—Approved and filed Aug. 2, 1922; omitted in printing

---

[fol. 30] [File endorsement omitted]

[fol. 31] In Circuit Court of Putnam County

[Title omitted]

Supplemental Motion to Dissolve Temporary Injunction—Filed Aug. 1, 1922

Comes now the defendant, by its solicitors, and moves the court to dissolve the temporary injunction herein granted on the 28th day of July, A. D. 1922, and for grounds of said motion sets forth and shows:

1. No facts are alleged in the bill of complaint or made to appear by supporting affidavit sufficient to dispense with the notice required by equity rule 46.

2. It appears from an inspection of the bill of complaint and the file marks thereon that upwards of four full days intervened between the filing of said bill of complaint and the time when any possible injury could have been suffered by the complainant, within which time sufficient notice could have been given to the defendant.

3. It is not alleged that the giving of notice to the defendant would have accelerated the apprehended injury.

4. It affirmatively appears that the giving of the notice required by rule 46, governing upon this court, would not have accelerated [fol. 32] the apprehended injury.

5. No irreparable injury is made to appear nor are any facts alleged from which any irreparable injury could have been reasonably apprehended.

6. It affirmatively appears that the only possible injury to the complainant is reducible to dollars and there is no allegation that the defendant is insolvent.

7. It does not appear that the order for the temporary injunction was issued by any one having lawful authority to make said order.

W. B. Crawford, J. T. G. Crawford, Solicitors for Defendant.

---

[File endorsement omitted]

IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

DEMURRER TO BILL OF COMPLAINT—Filed Aug. 1, 1922

Comes now the defendant Southern Utilities Company, a corporation organized and existing under the laws of the State of Florida, [fol. 33] by its solicitors, and says that the bill of complaint herein is bad in substance, and demurs thereto upon the following grounds:

1. The bill of complaint does not make or state any cause for equitable relief.

2. It is not alleged that the franchise rate of ten cents per kilowatt meter measurement yields to the defendant a reasonable compensation.

3. It is not alleged that the rate of thirteen cents per kilowatt meter measurement is excessive.

4. The franchise rate of ten cents per kilowatt meter measurement is not now binding either upon the complainant or upon the defendant.

5. It is not alleged that the complainant has ever been authorized by the Legislature of the State of Florida to fix by contract rates to be charged for electrical current over any period of time including the time the bill of complaint here was filed.

6. It is not alleged that the complainant has any legislative authority to regulate rates to be charged for electric current.

7. It is not alleged that the complainant has in any lawful manner attempted to regulate the rates to be charged for electrical current.

W. B. Crawford, J. T. G. Crawford, Solicitors for Defendant.

We, the solicitors for the defendant in the above entitled cause, do hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

W. B. Crawford, J. T. G. Crawford.

Jurat showing the foregoing was duly sworn to by A. W. Houston omitted in printing.

---

[fol. 34] IN CIRCUIT COURT OF PUTNAM COUNTY

STATE OF FLORIDA,
County of Putnam:

AFFIDAVIT OF J. E. JOHNSON—Filed Aug. 12, 1922

Before the undersigned authority, this day personally came J. E. Johnson, who, after being by me first duly sworn, on oath, says that he is an inhabitant of the City of Palatka and a consumer of electricity in the City of Palatka furnished by Southern Utilities Company, a Florida corporation, defendant in that certain cause pending in the Circuit Court of the Eighth Judicial Circuit of Florida, in and for Putnam County, in which the City of Palatka is complainant; that he is a member of the City Council of the City of Palatka; that said Southern Utilities Company has charged the rate of thirteen cents per kilowatt hour for electricity for commercial electric lighting furnished the inhabitants of the City of Palatka and patrons of the defendant in the City of Palatka, including this affiant, for the past six months, said charge of thirteen cents per kilowatt hour being three cents per kilowatt hour in excess of the contract rate set out in the ordinance of said City under which the defendant is now operating.

Affiant further says that said Southern Utilities company accepted the grant from the City of Palatka and operated under the same as in the bill of complaint alleged, and further recognized the same [fol. 35] as a contract binding on it as to the rate to be charged for commercial electric lighting in the City of Palatka, by making application to the City Council of said City, during the World War for temporary contract by the terms of which the defendant could increase its rate from ten cents per kilowatt hour, as provided in its contract with the City, to thirteen cents per kilowatt hour, and in said application agreed to return to the then existing contract rate at the expiration of said temporary contract, which authority was granted by the City; that the authority granted to increase said rate as aforesaid, expired on the 1st day of January, 1922, and said Company was notified to comply with the terms of its contract; that said company has since been repeatedly notified by officers and agents of the City of Palatka to comply with the terms of said contract, and this affiant, personally and as a member of the City Council of the City of Palatka, has each month protested against such excessive charge, and said company has refused to comply with its contract and still refuses so to do.

Affiant further says that if the temporary injunction or restraining order granted by the Court on the 28th day of July, A. D. 1922, had not been granted, the interest of the City of Palatka and the

inhabitants of said City would have been unduly prejudiced, and said City and its inhabitants would have suffered irreparable injury; that notice to said defendant would have accelerated the apprehended injury; and that if said temporary injunction or restraining order be dissolved at this time, or hereafter, the interest of the City of Palatka, the inhabitants of said City and patrons of said defendant will be unduly prejudiced and will suffer irreparable injury, in this:

That said temporary injunction or restraining order granted on the 28th day of July, 1922, became effective, and could only become effective, upon the complainant furnishing bond as therein provided, and notice that said injunction had been perfected and was effective was served on the defendant on the afternoon of July 29th, 1922; that the agent of said Southern Utilities Company had, [fol. 36] before the 29th day of July, 1922, read the meter installed by the defendant in affiant's dwelling, and other meters installed by defendant, and made the charge for electricity consumed during the month of July; that affiant on the 31st day of July, 1922, received a statement or notice from Southern Utilities Company notifying him that he was indebted to said company in the sum of $3.77, which amount represented 29 kilowatt hours of electricity consumed by him during the month of July at the rate of thirteen cents per kilowatt hour, meter measurement, and in said notice further notified affiant that in default of payment of said sum before the 10th day of August, service might be discontinued without further notice and that a service charge of $1.50 would be imposed upon affiant for re-connecting meter. And affiant says that said statement or notice was deposited in the Postoffice at Palatka, Florida, as shown by the postmark thereon, on the 29th day of July, 1922, at 11 o'clock, p. m., which was several hours after the temporary injunction or restraining order was served upon the defendant, and affiant says that if notice had been given the defendant of application for temporary injunction or restraining order, the said excessive sum above referred to would have been paid to and collected by the defendant before said temporary injunction or restraining order could have been made effective.

Affiant further says that if the temporary injunction or restraining order granted be dissolved, the defendant will collect the charge so made for electricity furnished during the month of July, to-wit, the sum of Thirteen cents per kilowatt hour, meter measurement, the same being three cents per kilowatt hour in excess of the contract rate set out in the ordinance under which the defendant is now operating, and will continue to charge and collect said excessive rate each month hereafter; or in default of the payment of such excessive rate, the defendant, under rules and regulations promulgated by it, will suspend furnishing commercial electric lighting [fol. 37] to the inhabitants and patrons of the defendant in the City of Palatka.

Affiant further says that if the temporary injunction or restraining order be dissolved, and the defendant allowed to collect said

excessive rate, affiant will be compelled to maintain an action at law to recover the sums so paid by him in excess of the contract rate, to-wit, three cents per kilowatt hour, and each patron of the defendant in the City of Palatka, numbering several hundred, will be compelled to bring his action at law to recover the sums paid by him in excess of said contract rate.

J. E. Johnson.

Sworn to & subscribed before me this 7th day of August, A. D. 1922. G. C. Alderman, Notary Public, State of Florida at Large. (Seal.)

[File endorsement omitted.]

---

STATE OF FLORIDA,
County of Putnam:

AFFIDAVIT OF GEORGE VELIASISH—Filed Aug. 12, 1922

Before the undersigned authority this day personally appeared George Veliasish, who after being by me first duly sworn on oath says, that he is an inhabitant of the City of Palatka and a consumer of electricity for commercial electric lighting in the City of Palatka at his place of business known as Chick's Quick Lunch, furnished by Southern Utilities Company, a Florida corporation, defendant in that certain cause pending in the Circuit Court of Florida, Eighth Judicial Circuit in and for Putnam County, in which the City of Palatka is complainant; that said defendant com-[fol. 38] pany has charged and collected the rate of thirteen cents per kilowatt hour for electricity for commercial electric lighting furnished the inhabitants of the City of Palatka, and patrons of the defendant in the City of Palatka, including this affiant, for the past six months, the said charge of thirteen cents per kilowatt hour being three cents per kilowatt hour in excess of the contract rate set out in the ordinance of said city under which the defendant is now operating.

Affiant further says that if a temporary injunction or restraining order granted by the Court on the 28th day of July, 1922, had not been granted, the interest of the City of Palatka and the inhabitants of said City would have been unduly prejudiced and the said City and its inhabitants would have suffered irreparable injury; that notice to said defendant would have accelerated the apprehended injury, and that if said temporary injunction or restraining order be dissolved at this time or hereafter, the interest of the City of Palatka, the inhabitants of said City and patrons of said defendant will be unduly prejudiced and will suffer irreparable injury, in this:

That said temporary injunction or restraining order granted on the 28th day of July, 1922, became effective and could only become effective upon the complainant furnishing bond as therein pro-

vided, and notice that said injunction had been perfected and was effective was served upon the defendant on the afternoon of July 29th, 1922; that the agent or servant of said defendant had, before the 29th day of July, 1922, read the meter installed by the defendant in the place of business of said affiant and other meters installed by defendant in the City of Palatka, and made the charge for electricity consumed by the patrons of the defendant in the city of Palatka during said month of July; that on the 31st day of July, 1922, said deponent received a statement or notice from the defendant notifying him that he was indebted to said company in the sum of 28.86 dollars, which represented 222 kilowatt hours of electricity consumed by him during the month of July at the rate of [fol. 39] thirteen cents per kilowatt hour meter measurement, and in said notice deponent was further notified that in default of payment of said sum before the 10th of August service would be discontinued without further notice and a service charge of $1.50 would be imposed for re-connecting meter; and affiant says that said statement or notice, as was similar notices and statements to patrons of the defendant in the City of Palatka, was deposited in the postoffice at Palatka, Florida, as shown by the post mark thereon, on the 29th day of July, 1922, and affiant says that if notice had been given to defendant of application for injunction or restraining order the said excessive charge above referred to would have been paid to and collected by the defendant before such temporary injunction or restraining order could have been granted and made effective.

Affiant further says that if the temporary injunction or restraining order granted be dissolved, the defendant will collect the charge so made for electricity during the month of July, to-wit, the sum of thirteen cents per kilowatt hour, being three cents in excess of the contract rate set out in the ordinance under which the defendant is now operating, and will continue to charge and collect said excessive rate each month hereafter; or in default of the payment of such excessive rate, the defendant, under the rules and regulations promulgated and enforced by it, will suspend furnishing commercial electric lighting to the inhabitants and patrons of said defendant in the City of Palatka.

Affiant further says that if the temporary injunction or restraining order be dissolved, and the defendant allowed to collect said excessive rate, affiant will be compelled to maintain an action at law to recover the sum so paid by him in excess of the contract rate, to-wit, three cents per kilowatt hour, and each patron of the defendant in the City of Palatka, numbering several hundred, will be compelled to bring separate actions at law to recover the sums paid [fol. 40] by them in excess of said contract rate, thereby necessitating a multiplicity of actions. And affiant says that if said temporary injunction or restraining order be dissolved and defendant allowed to collect said excessive rate, affiant will be compelled to employ an attorney in maintaining his action at law for the recovery of said excessive charge, and pay out other sums of money necessary in maintaining his said action, the amount of which cannot be as-

certained at this time, and that other patrons of said defendant will be compelled in like manner to incur similar expenses, and affiant says that the damage to the inhabitants of the City of Palatka and patrons of the defendant in the City of Palatka cannot be ascertained or calculated at this time, should said temporary injunction or restraining order be dissolved. And affiant says that the damage to the City of Palatka, its inhabitants and patrons of the defendant in said City would be great, irreparable and their rights unduly prejudiced, and their damage through the dissolution of said temporary injunction or restraining order would be greater than the possible damage to the defendant through the continuance of same.

George Veliasish.

Sworn to and subscribed before me this 11th day of August, A. D. 1922. Thos. B. Dowda, Justice of the Peace, 8th District, Putnam County, Florida. (Seal.)

[File endorsement omitted.]

---

[fol. 41] IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER

This cause coming on to be heard before the undersigned, the Judge of the Circuit Court of Florida, for Duval County, Flordia, the Honorable A. V. Long, Judge of the Circuit Court of Florida, 8th Judicial Circuit, for Putnam County, having certified his disqualification, upon demurrer to the bill of complaint filed herein, and motion to dissolve the temporary injunction or restraining order heretofore granted and the same having been argued by counsel for the respective parties, and the Court being fully advised in the premises, it is therefore,

Ordered that the demurrer to the bill of complaint be, and each ground of demurrer is, hereby overruled.

It is further ordered that the motion to dissolve the temporary injunction or restraining order be, and the same is hereby denied.

It is further ordered that the temporary injunction or restraining order heretofore granted by this court be effective until the further order of Court and the said Southern Utilities Company, a corporation, defendant, according to the terms of said former order and of this order, be, and they are hereby, temporarily and until the further order of Court restrained and enjoined from collecting from the inhabitants of the City of Palatka and patrons of the [fol. 42] defendants in the City of Palatka more than ten cents per kilowatt hour meter measurement for electricity furnished by said defendant for commercial electric lighting, including the lighting of homes.

It is further ordered that the complainant furnish a good and sufficient bond in the sum of two thousand dollars, to be approved by the Clerk of the Circuit Court of Putnam County, conditioned to pay to the defendant such costs and damages as it may sustain by the improper issuance of this order in case the same shall be hereafter vacated or the bill of complaint dismissed.

Done in chambers, at Jacksonville, Duval County, Flordia, this 16th day of August, A. D. 1922.

Daniel A. Simmons, Judge of the Circuit Court for Duval County, Flordia, pro Hæc Vice-Judge of the Eighth Judicial Circuit of Florida, disqualified.

---

[fol. 43] Bond on Temporary Injunction for $2,000—Approved and filed Aug. 18, 1922; omitted in printing

[fol. 44] [File endorsement omitted.]

---

[fol. 45] In Circuit Court of Putnam County

[Title omitted]

Motion for Order Requiring Additional Bond and Affidavit Thereto—Filed Sept. 12, 1922

Comes now the respondent in above entitled cause of action and moves the court for an order requiring complainant in above entitled cause of action to give additional bond for the better protection of respondent.

Respectfully submitted, W. B. Crawford, Counsel for respondent.

[File endorsement omitted.]

---

State of Florida,
Putnam County:

Before the undersigned authority this day personally came Emmons Graham, who, after being sworn, deposes and says that he is the manager of the Palatka electric light plant and works of Southern Utilities Company and has been such manager for more than a year; that as such manager he has active management of the operation of the said electric light plant and works of said Southern Utilities Company in the City of Palatka, Florida, and has full custody of all of the records pertaining to said plant; that the books of said company show that the total amount of electricity supplied to its patrons during the month of July, 1922, at the rate of thirteen

[fol. 46] cents per kilowatt hour, meter measurement, amounts to $3,243.54, and that the same amount of electricity figured at the rate of ten cents per kilowatt hour, meter measurement, would amount to $2,612.28; that the total amount of electricity furnished for the month of August, 1922, at the rate of thirteen cents per kilowatt hour, meter measurement, amounts to $3,067.63, and that the same amount of electricity figured at ten cents per kilowatt hour, meter measurement, would amount to $2,453.52; that he estimates the total amount of electricity to be furnished during the month of September, 1922, at the rate of thirteen cents per kilowatt hour, meter measurement, to amount to $3,450.00, and that the same amount of electricity furnished at the rate of ten cents per kilowatt hour, meter measurement, will be $2,780.00; that he estimates that the amount of electricity to be furnished during the month of October, 1922, at the rate of thirteen cents per kilowatt hour, meter measurement, would amount to $3,860.00, and that the same amount of electricity at the rate of ten cents per kilowatt hour, meter measurement, would amount to $3,120.00; that he estimates that the amount of electricity to be furnished during the month of November, 1922, at the rate of thirteen cents per kilowatt hour, meter measurement, would amount to $4,380.00, and that the same amount of electricity at the rate of ten cents per kilowatt hour, meter measurement, would amount to $3,508.00; that he estimates that the amount of electricity to be furnished during the month of December, 1922, at the rate of thirteen cents per kilowatt hour, meter measurement, would amount to $4,900.00, and that the same amount of electricity at the rate of ten cents per kilowatt hour, meter measurement, would amount to $3,848.00.

Emmons Graham.

Sworn to and subscribed before me this 9th day of September, A. D. 1922. E. W. Neate, Notary Public, State of Florida. (N. P. Seal.)

---

[fol. 47] IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

ORDER REQUIRING ADDITIONAL BOND

This cause coming on to be heard before the undersigned Judge of the Seventeenth Judicial Circuit of the State of Florida, in and for Orange County, the Hon. A. V. Long, Judge of the Eighth Judicial Circuit of the State of Florida for Putnam County, having certified his disqualification, upon the motion of the respondent for an order requiring the complainant in above-entitled cause of action to give additional bond for the better protection of respondent, and it appearing to the satisfaction of the court that due and legal notice of the said motion has been given to counsel for complainant, and evidence having been submitted to the court showing the

necessity for additional bond in said cause, it is considered by the [fol. 48] court that additional bond should be required and that the motion of complainant is reasonable and just and should be granted; it is, therefore,

Ordered, that the complainant, City of Palatka, Florida, furnish a good and sufficient bond in the sum of $3,500.00 to be approved by the Clerk of the Circuit Court of Putnam County, Florida, on or before Oct. 1, 1922, conditioned to pay to the defendant such costs and damages as it may sustain by the improper issuance of the order of this court dated August 16, 1922, in case the same shall be hereafter vacated, and the bill of complaint dismissed. The said bond being in addition to the bond heretofore filed in said cause in pursuance of the order of August 16, 1922, for the sum of $2,000.00.

Done and ordered in chambers at Orlando, Florida, this September 12, 1922.

C. O. Andrews, Judge of the Circuit Court for Seventeenth Judicial Circuit of the State of Florida, in and for Orange County, pro Hæc Vice Judge of the Eighth Judicial Circuit of the State of Florida for Putnam County, disqualified.

---

[fol. 49] Bond on Temporary Injunction for $3,500—Approved and filed Sept. 30, 1922; omitted in printing

---

[fol. 50] [File endorsement omitted]

[fol. 51] In Circuit Court of Putnam County

[Title omitted]

Plea—Filed Sept. 4, 1922.

The Plea of Southern Utilities Company, a Corporation, Defendant, to the Bill of Complaint of the City of Palatka, a Municipal Corporation, Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in complainant's said bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, does plead thereunto, and for plea says:

That by the certain franchise ordinance, a true copy of which is attached to and made a part of the said bill of complaint herein, the complainant, City of Palatka, undertook to fix a maximum rate for commercial electric lighting to be furnished by the defendant to the inhabitants of the said city of Palatka under said franchise

ordinance; that by the terms of said franchise ordinance the said maximum rate for said commercial electric lighting was to extend over a period of thirty years from the date thereof, to-wit, August 21, 1914; that although the said franchise rate of ten cents per kilowatt was reasonable at the date of said franchise ordinance and so remained for a long time thereafter, the great change in economic conditions brought about by the world war have rendered it impossible for this defendant to manufacture and distribute electric cur- [fol. 52] rent for commercial electric lighting at said rate of ten cents per kilowatt, meter measurement, as prescribed in said franchise ordinance, and leave to this defendant a reasonable return on its property devoted to said purposes; that this defendant is operating its said property as economically as possible; that said rate of ten cents per kilowatt is unreasonably low; that if compelled to continue to manufacture and distribute electric current for commercial electric lighting at said rate fixed by said franchise ordinance its said property will, in effect, be confiscated and it will be deprived of its said property without due process of law and it will be denied the equal protection of the laws as guaranteed by the Constitution of the United States; that said franchise ordinance, insofar as it purports to prescribe said rate of ten cents per kilowatt, meter measurement, is in conflict with Section 30 of Article XVI of the Constitution of the State of Florida and is void and of no effect; that in order to yield to this defendant a reasonable return upon its property devoted to the manufacture and distribution of electric current as aforesaid it is necessary for this defendant to charge and collect at a rate of not less than thirteen cents per kilowatt, meter measurement, for said commercial electric lighting; that said sum of thirteen cents per kilowatt is a reasonable rate.

All of which matters and things this defendant avers to be true and pleads the same to the whole of said bill of complaint and demands the judgment of this Court whether it ought to be compelled to make any answer to the said bill of complaint, and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

Southern Utilities Company, by A. W. Houston, Vice-President. W. B. Crawford, J. T. G. Crawford, Solicitors for Defendant. (Corporate Seal.)

[fol. 53] I hereby certify that in my opinion the foregoing plea is well founded in point of law.

J. T. G. Crawford, Solicitor for Defendant

Jurat showing the foregoing was duly sworn to by A. W. Houston omitted in printing.

[File endorsement omitted]

IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

PRÆCIPE SETTING PLEA—Filed Oct. 2, 1922

Comes now the complainant in the above entitled cause and sets [fol. 54] down for argument the plea filed by the defendants in this cause on the rule day in September, A. D. 1922.

Thos. B. Dowda, W. P. Dineen, & J. J. Canon, Solicitors for Complainant.

---

IN CIRCUIT COURT OF PUTNAM COUNTY

ORDER OVERRULING PLEA

The within plea, having been duly set down for argument, came on this day for hearing before me, and having been argued by counsel and the Court being fully advised in the premises, it is

Ordered that said plea be and it is hereby over ruled as insufficient.

Done and ordered at Jacksonville, Florida, this October 30, 1922.

Daniel A. Simmons, Judge of the Circuit Court for Duval County, Florida, pro Hæc Vice-Judge of the Eighth Judicial Circuit of Florida, Disqualified.

---

[fol. 55] IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

FINAL DECREE—Filed Oct. 30, 1922

This cause coming on this day to be further heard before the undersigned Judge of the Circuit Court for Duval County, Florida (it appearing by the record that the Honorable A. V. Long, Judge of the Circuit Court of the Eighth Judical Circuit of Florida, is disqualified and has filed his certificate of disqualification), and it appearing to the Court that the defendant herein filed its plea to the bill of complaint herein on September 4, 1922; that said plea was thereafter duly set down for argument, and upon the argument thereof heretofore on this day had, said plea has been overruled and held insufficient, and the said defendant having announced that it elected to abide by the said plea, and the Court being otherwise fully advised in the premises, it is thereupon

Ordered, adjudged and decreed:

1. That the equities in this cause are with the complainant;

2. That the restraining order heretofore granted herein on July 28, 1922, and the temporary injunction heretofore granted herein on August 16, 1922, be and each of them are hereby confirmed and approved;

3. That in accordance with the prayer of the bill of complaint, said temporary restraining order and said temporary injunction be and they are hereby made permanent and said defendant Southern [fol. 56] Utilities Company be and it is permanently enjoined and restrained from collecting from the inhabitants of the City of Palatka and the patrons of said Southern Utilities Company in the City of Palatka more than ten cents per kilowatt hour, meter measurement, for electricity furnished by said defendant for commercial electric lighting, including the lighting of homes;

4. It is further ordered that the defendant pay the costs herein, to be taxed by the clerk.

Done and ordered in Chambers at Jacksonville, Duval County, Florida, this 30th day of October, A. D. 1922.

Dan'l A. Simmons, Judge of the Circuit Court for Duval County, Florida, pro Hæc Vice-Judge of the Eighth Judicial Circuit of Florida, Disqualified.

---

[File endorsement omitted]

IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 7, 1922

Comes now Southern Utilities Company a corporation, defendant in the above-entitled cause, and takes and enters its appeal herein [fol. 57] to the Supreme Court of the State of Florida from the final decree herein dated October 30, A. D. 1922, and recorded on October 31, A. D. 1922, in Chancery Order Book 7 at page 474, granting to the complainant herein a permanent injunction as prayed for in the bill of complaint.

And said defendant hereby makes its said appeal returnable to the 18th day of December, A. D. 1922.

The City of Palatka, complainant in this cause, will take notice of the entry of this appeal.

W. B. Crawford, J. T. G. Crawford, Solicitors and of Counsel for the Defendant, Appellant.

Clerk's certificate to foregoing paper omitteed in printing.

[File endorsement omitted]

[fol. 58] IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 7, 1922

Comes now the defendant Southern Utilities Company, a corporation, by its solicitors, and assigns the following errors upon and in pursuance of its appeal to the Supreme Court of the State of Florida entered in the above entitled cause, that is to say:

First. That the Circuit Court erred in making and entering its final decree of October 30, 1922 granting to the complainant City of Palatka a permanent injunction restraining the said defendant from charging for commercial electric lighting at a greater rate than that fixed by the ordinance of said city approved August 21, 1914, purporting to fix a maximum rate over a period of thirty years;

(a) On the ground that the said ordinance is in conflict with Section 30 of Article XVI of the Constitution of the State of Florida.

(b) On the ground that the said maximum rate is confiscatory and the said injunction deprives the defendant of its property without due process of law contrary to the guarantee of the Constitution of the State of Florida.

Second. That the said Circuit Court erred in granting the temporary injunction or restraining order without notice to the defendant.

[fol. 59] Third. That the said Circuit Court erred in denying the defendant's motion to dissolve the said temporary injunction presented to Judge Andrews July 31, 1922;

Fourth. That the said Circuit Court erred in denying the defendant's supplemental motion to dissolve said temporary injunction presented to Judge Simmons on August 12, 1922;

Fifth. That the said Circuit Court erred in overruling the defendant's demurrer to the bill of complaint.

Sixth. That the said Circuit Court erred in overruling the defendant's plea to the bill of complaint.

Seventh. That the said Circuit Court erred in making and entering its final decree of October 30, 1922 granting to the complainant City of Palatka a permanent injunction restraining the said defendant from charging for commercial electric lighting at a greater rate than that fixed by the ordinance of said city approved August 21, 1914, purporting to fix a maximum rate over a period of thirty years.

(a) On the ground that the said maximum rate is confiscatory and the said injunction deprives the defendant of its property with-

out due process of law contrary to the first section of the Fourteenth Amendment to the Constitution of the United States.

(b) On the ground that the said injunction denies to the said defendant the equal protection of the laws contrary to the first section of the Fourteenth Amendment to the Constitution of the United States.

W. B. Crawford, J. T. G. Crawford, Solicitors and of Counsel for Defendant, Appellant.

Received a copy of the foregoing assignment of errors this 7th day of Novemeber, 1922.

Thos. P. Dowda, W. P. Dineen & J. J. Canon, Solicitors and of Counsel for Complainant, Appellee.

---

[fol. 60] [File endorsement omitted]

IN CIRCUIT COURT OF PUTNAM COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF THE RECORD—Filed Nov. 7, 1922

To the Clerk of said Court:

You are hereby directed to commence making up the record in the appeal entered herein by Southern Utilities Company, on the 23rd day of November, A. D. 1922, and to include in, copy into and make a part of said record the following papers and proceedings, to-wit:

1. Copy the bill of complaint with its accompanying exhibits filed July 27, 1922;

2. Recite that on July 27, 1922, subpœna in chancery was duly issued directed to the defendant;

3. Recite that on July 28, 1922 said subpœna was duly served upon the defendant and that thereafter the defendant filed its appearance;

4. Copy certificate of disqualification of Hon. A. V. Long filed July 28, 1922;

5. Copy order for temporary injunction made by Honorable Daniel A. Simmons July 28, 1922, and sheriff's return of service thereof;

[fol. 61] 6. Copy the injunction bond filed by the complainant on July 29, 1922;

7. Copy the temporary injunction with proof of services thereof issued July 29, 1922;

8. Copy the motion of the defendant filed July 31, 1922 to dissolve the temporary injunction;

9. Copy the affidavit of A. W. Houston, filed by the defendant July 31, 1922;

10. Copy order on motion to dissolve the temporary injunction made by Honorable Charles O. Andrews July 31, 1922;

11. Copy the additional bond filed by the complainant August 2, 1922;

12. Copy the supplemental motion to dissolve the temporary injunction filed by the defendant August 1, 1922;

13. Copy the demurrer filed by the defendant to the bill of complaint on August 1, 1922;

14. Copy the affidavit of J. E. Johnson filed by the complainant on August 12, 1922;

15. Copy the affidavit of George Veliasish filed by the complainant August 12, 1922;

16. Copy the order of Judge Simmons made August 16, 1922, on the supplemental motion to dissolve the temporary injunction and demurrer to the bill of complaint;

17. Copy bond filed by the complainant August 18, 1922, in obedience to Order of August 16, 1922;

18. Copy motion filed by the defendant to require the complainant to file additional bond September 12, 1922;

19. Copy affidavit filed by defendant made by Emmons Graham. September 12, 1922;

20. Copy order made by Judge Andrews September 12, 1922 on motion for additional bond;

21. Copy additional bond filed September 30, 1922, required by order of September 12, 1922;

22. Copy plea of the defendant to the bill of complaint filed September 4, 1922;

23. Copy præcipe setting down plea for argument filed by complainant October 2, 1922;

24. Copy order made by Judge Simmons upon defendant's plea made October 30, 1922;

25. Copy final decree made by Judge Simmons on October 30, 1922;

[fol. 62] 26. Copy entry of appeal and notice thereof together with certificate of recordation filed November 7th, 1922;

27. Copy assignment of errors with proof of service upon complainant's solicitors filed by defendant on November 7th, 1922;

28. Copy the directions for making up transcript of record filed by the defendant on November 7th 1922;

29. Certify the correctness of said transcript.

30. Omit all other papers and proceedings.

W. B. Crawford, J. T. G. Crawford, Solicitors and of Counsel for Defendant, Appellant.

Received a copy of the foregoing directions this 7th day of November 1922.

Thos. B. Dowda, W. P. Dineen, & J. J. Canon, Solicitors and Counsel for Complainant.

[fol. 63] IN CIRCUIT COURT OF PUTNAM COUNTY

CLERK'S CERTIFICATE

I, R. J. Hancock, Clerk of the Circuit Court in and for the County of Putnam, State of Florida, do hereby certify that the foregoing pages numbered One (1) to Sixty-three (63) inclusive, contain a correct transcript of record of the judgment and decree in the case of City of Palatka, complainant, against Southern Utilities Company, a corporation, defendant, and a true and correct recital and copy of all such papers and proceedings in said cause, as appear from the records and files in my office, that have been directed to be included in said transcript by the written demands of the parties.

In witness whereof I have hereunto set my hand and affixed the seal of said Circuit Court this fifth day of December, A. D. 1922.

R. J. Hancock, Clerk Circuit Court, Putnam County, Florida, by W. A. Williams, Jr., Deputy Clerk. (Seal of the Circuit Court.)

---

[fol. 64] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA, JUNE TERM 1923, DIVISION B

SOUTHERN UTILITIES COMPANY, a Corporation, Appellant,

v.

CITY OF PALATKA, a Municipal Corporation, Appellee

Putnam County

OPINION—Filed Dec. 21, 1923

WHITFIELD, P. J.:

The bill of complaint herein brought by the city, in effect alleges that in 1914 the city by ordinance made a contract, by which the city granted to the predecessors of the utility company "and its successors and assigns, the right and privilege to construct, own, operate and maintain in the City of Palatka, Florida, a plant or plants for the manufacture, sale and distribution of electricity, gas and other illuminants or products for light, power and fuel; and to lay mains, pipes and fixtures under the streets, lanes, alleys, sidewalks and bridges of said city for the distribution of gas, and to erect poles, lamp posts, wires and appliances for the transmission of electricity and power, under, through, over and across the said streets, lanes, alleys, sidewalks and bridges of said city for a period of thirty years from said date; that as a consideration for the granting of such right and privilege by said City of Palatka to said Palatka Gas Light & Fuel Company and its successors and assigns, said

[fol. 65] Palatka Gas Light & Fuel Company covenanted and agreed with said City of Palatka as an incident to said grant referred to in paragraph three thereof, that the rates to be charged in the City of Palatka for commercial electric lighting should not be more than ten cents per kilowatt, meter measurement, for the first ten years, and not more than nine cents per kilowatt thereafter, meters to be furnished and kept in repair by the grantees at its own expense, and the minimum charge should not be more than one dollar and fifty cents per month; that said Palatka Gas Light & Fuel Company accepted said ordinance or grant, and all the covenants and conditions therein contained, in its entirety, by istrument in writing, and by constructing, owning, operating and maintaining in said City of Palatka a plant or plants for the manufacture, sale and distribution of electricity, gas and other illuminants or product for light, power and fuel, and erecting poles, lamp posts, wires and appliances for the transmission of electricity and power, under, through, over and across the said streets, lanes, alleys, sidewalks and bridges of said City of Palatka; that on the 1st day of January, A. D. 1917, the Palatka Gas Light & Fuel Company, a corporation as aforesaid, then enjoying the rights and privileges granted by said City of Palatka, and accepted by it, and operating and carrying on the business contemplated by said grant, assigned and transferred the rights and privileges so granted to it by said City of Palatka, as aforesaid, to the Palatka Public Service Company, a corporation under the laws of the State of Florida, with principal place of business in the City of Palatka, Putnam County, Florida; that on the 1st day of November, A. D. 1917, the Palatka Public Service Company, a corporation, as aforesaid, then enjoying the rights and privileges granted by said City of Palatka to and accepted by said Palatka Gas Light & Fuel Company, and assigned and transferred to it by said Palatka Gas Light & Fuel Company, and operating and carrying on the business contemplated by said grant and assignment thereof, transferred and assigned said rights and privileges granted and assigned to it as aforesaid to the Southern Utilities Company, [fol. 66] a corporation, as aforesaid, defendant; that said defendant, under said assignment from Palatka Public Service Company, a corporation, as aforesaid, to it, accepted said ordinance or grant, and all the conditions, covenants and agreements therein contained, in its entirety, and under said ordinance or grant as assigned to it, has constructed, owned, operated and maintained in the City of Palatka, Florida, a plant for the manufacture, sale and distribution of electricity, and has erected poles, lamp posts, wires and other appliances for the transmission of electricity and power, under, through, over and across the streets, lanes, alleys, sidewalks and bridges of said city, and has manufactured, sold and distributed electricity in said City of Palatka from the 1st day of November, A. D. 1917, until the present time, to the City of Palatka for lighting the streets, public places and public buildings of said city, and furnished electricity for light and power to the inhabitants of said city who desire to procure the same, and who paid therefor at the

rate charged by said defendant, and enjoyed and exercised all the rights and privileges granted by and incident to said ordinance, and continues to enjoy and exercise all said rights and privileges at this time; that notwithstanding the conditions and covenants contained in said ordinance, and the duty of said defendant to furnish the City of Palatka and the inhabitants thereof electricity for lighting and power under the terms of said ordinance, the defendant has refused and neglected, and still refuses and neglects to comply with the conditions and covenants in said ordinance contained, and has charged and collected each month from the inhabitants of said City of Palatka and patrons of said defendant in said City of Palatka, and continues to charge and collect each month from the inhabitants of said City of Palatka and patrons of said defendant in said City of Palatka, for commercial electric lighting, thirteen cents per kilowatt, meter measurement, and a minimum charge of one dollar and fifty cents per month; and complainant says that it has protested to said defendant against such charge in excess of the rate prescribed [fol. 67] in said ordinance as incident to the grant of the rights and privileges therein and thereby granted, and repeatedly notified and requested said defendant to comply with the covenants and conditions of said ordinance, and defendant has refused, and still refuses and neglects so to do, persisting in violating the same, and defying the complainant in its efforts to obtain a compliance therewith."

It is prayed that the "Southern Utilities Company, a corporation, defendant, may be restrained and enjoined by decree of this court from charging and collecting from the inhabitants of said City of Palatka and patrons of said defendant in the City of Palatka, said rate of thirteen cents per kilowatt, meter measurement, for commercial electric lighting, or any rate for such commercial electric lighting in the City of Palatka in excess of the rate set out as incident to the grant of the rights and privileges contained in said ordinance, to-wit: the rate of ten cents per kilowatt, meter measurement, that a temporary injunction or restraining order be issued, without notice, out of this Honorable Court, of like character, directed to the defendant and upon final hearing, said temporary injunction be made permanent, and for such other and further relief in the premises as equity may require and to this court may seem meet and proper."

A temporary restraining order was granted. Motions to dissolve the restraining order or temporary injunction were denied, appropriate bonds being required.

A demurrer to the bill of complaint was overruled.

The following plea was overruled: "That by the certain franchise ordinance, a true copy of which is attached to and made a part of the said bill of complaint herein, the complainant, City of Palatka, undertook to fix a minimum rate for commercial electric lighting to be furnished by the defendant to the inhabitants of the said City of Palatka under said franchise ordinance; that by the terms of said franchise ordinance the said maximum rate for said commercial

electric lighting was to extend over a period of thirty years from the date thereof, to-wit, August 21, 1914; that although the said franchise rate of ten cents per kilowatt was reasonable at the date of [fol. 68] said franchise ordinance, and so remained for a long time thereafter, the great change in economic conditions brought about by the world war have rendered it impossible for this defendant to manufacture and distribute electric current for commercial electric lighting at said rate of ten cents per kilowatt, meter measurement, as prescribed in said franchise ordinance, and leave to this defendant a reasonable return on its property devoted to said purposes; that this defendant is operating its said property as economically as possible; that said rate of ten cents per kilowatt is unreasonably low; that if compelled to continue to manufacture and distribute electric current for commercial electric lighting at said rate fixed by said franchise ordinance, its said property will, in effect, be confiscated, and it will be deprived of its said property without due process of law, and it will be denied the equal protection of the laws as guaranteed by the constitution of the United States; that said franchise ordinance, insofar as it purports to prescribe said rate of ten cents per kilowatt, meter measurement, is in conflict with Section 30 of Article XVI of the constitution of the State of Florida and is void and of no effect; that in order to yield to this defendant a reasonable return upon its property devoted to the manufacture and distribution of electric current, as aforesaid, it is necessary for this defendant to charge and collect at a rate of not less than thirteen cents per kilowatt, meter measurement, for said commercial electric lighting; that said sum of thirteen cents per kilowatt is a reasonable rate."

The final decree "ordered, adjudged and decreed:

"1. That the equities in this cause are with the complainant;

"2. That the restraining order heretofore granted herein on July 28, 1922, and the temporary injunction heretofore granted herein on August 16, 1922, be and each of them are hereby confirmed and approved;

"3. That in accordance with the prayer of the bill of complaint, said temporary restraining order and said temporary injunction be [fol. 69] and they are hereby made permanent and said defendant, Southern Utilities Company, be and it is permanently enjoined and restrained from collecting from the inhabitants of the City of Palatka and the patrons of said Southern Utilities Company in the City of Palatka more than ten cents per kilowatt hour, meter measurement, for electricity furnished by said defendant for commercial electric lighting, including the lighting of homes."

An appeal from the final decree was taken by the defendant company.

In brief, the contention of the utility company, appellant, is that under Section 30, Article XVI, of the Florida Constitution, the city could not enter into a binding contract fixing rates for electricity furnished the city or its inhabitants, and cites as authorities, City of

Tampa v. Tampa Water Works Co., 45 Fla. 600, 34 South. Rep. 631; Tampa Water Works Co. v. Tampa, 199 U. S. 241, 26 Sup. Ct. Rep. 23; Muscatine Lighting Co. v. Muscatine, 255 U. S. 539, 65 L. Ed. 764, 41 Sup. Ct. Rep. 400; San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 65 L. Ed. 777, 41 Sup. Ct. Rep. 428. The appellant also contends that the municipality had no legislative authority to enter into the contract in controversy fixing rates for individual consumers of electricity.

Section 8, Article VIII, of the State Constitution provides that: "The legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time."

Under this organic provision the legislature may by law authorize a municipality to make a contract for rates to be charged by public service corporations for service rendered to the municipality or its inhabitants, and such a contract when duly authorized and entered into will be binding on the parties thereto, but the contract will be subject to the power of the legislature under Section 30, Article XVI, of the Constitution to pass laws providing for regulating rates for "services of a public nature." City of Tampa v. Tampa Water [fol. 70] Works Co., 45 Fla. 600, 34 South. Rep. 631; Tampa Water Works Co. v. Tampa, 199 U. S. 241, 26 Sup. Ct. Rep. 23; State ex rel. Triay v. Burr, 79 Fla. 290, 84 South. Rep. 61; State ex rel. Ellis v. Tampa Water Works Co., 57 Fla. 533, 48 South. Rep. 639; Town of Brooksville v. Florida Tel. Co., 81 Fla. 436, 88 South. Rep. 307; State ex rel. Attorney General v. Atlantic Coast Line Ry., 52 Fla. 646, 51 South. Rep. 705.

Section 30, Article XVI, of the Florida Constitution, is as follows: "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures." In construing this organic provision, this court has said: "The power mentioned in this section is full power; a continuing, ever-present power. Being irrevocably vested by this section, the legislature cannot divest itself of it. Neither can it bind itself by contract, nor authorize a municipality —one of its creatures—to bind it by contract, so as to preclude the exercise of this power whenever in its judgment the public exigencies demand its exercise. Full power cannot exist, if by contract that power can be curtailed or impaired. Without this section this power to regulate rates would exist under the general grant of legislative power in Section 1, Article III, but such power could be surrendered by a contract made by the State or by a municipality by its authority. With this section in force, the power to surrender by contract the right to regulate rates is taken away, for the authority to surrender can not co-exist with the ever-present, continuing power to regulate, which is declared by this section to exist in the legislature. The section in question does not operate to prevent the legislature from making contracts itself, nor from authorizing munic-

ipalities to make them, and in and by such contracts stipulating for certain rates which will be valid and binding obligations so long as the legislature does not exercise or authorize municipalities [fol. 71] to exercise the power to prevent excessive charges which is declared by the section to be vested in the legislature. But every charter granted and every contract made by the legislature, or by a municipality under its authority, are accepted and made subject to and in contemplation of the possibility of the subsequent exercise of the power to prevent excessive charges, which by this section is unalterably and irrevocably vested in the legislature. The section not only becomes a part of every such contract, as much so as if written therein, but by implication it denies the authority of the legislature to bind itself either by a contract of its own making, or one made by a municipality under its authorization, not to exercise the power thereby recognized whenever in its wisdom it should think necessary so to do." City of Tampa v. Tampa Water Works Co., 45 Fla. 600, 34 South. Rep. 631.

There is nothing in the laws of the State that confers upon the city a power to regulate rates to be paid for electricity furnished in the city. Section 1932, Revised General Statutes, 19 applies to service rendered by plants operated by the city. See Chapter 4500, Acts of 1897.

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to defeat the legitimate government authority." Knox v. Lee, 12 Wall. (U. S.), 457, text 550, 551; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, text 376, 39 Sup. Ct. Rep. 117.

"There is no absolute freedom to do as one wills or to contract as one chooses. The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, text 567, 31 Sup. Ct. Rep. 259.

The duty of an owner of private property used for the public [fol. 72] service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public on the one hand and the private on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. San Antonio v. San Antonio Public Service Co., 255 U. S. 547, text 556, 65 L. Ed. 777, 41 Sup. Ct. Rep. 428.

Municipal contracts for the rendering of public service will be sustained where the power is given to make the contract, and the terms of it taken with the law controlling them are not clearly

violative of some provision or principle of law. State ex rel. Ellis v. Tampa Water Works Co., 56 Fla. 858, 47 South. Rep. 358.

In the Tampa Water Works cases the distinct holding is not that because of Section 30, Article XVI, of the State Constitution the city could not, even with legislative authority, make a valid contract fixing service rates with a public utility company operating within the city; but that such contracts when duly made are subject to laws passed by the legislature under Section 30, Article XVI, of the Constitution. See State ex rel. Triay v. Burr, 79 Fla. 290, 84 South. Rep. 61; State ex rel. Swearingen v. Railroad Commission of Florida, 79 Fla. 526, 84 South. Rep. 444; State ex rel. Ellis v. Tampa Water Works Co., 57 Fla. 533, 48 South. Rep. 639; State ex rel. Ellis v. Tampa Water Works Co., 56 Fla. 858, 47 South. Rep. 358; State ex rel. Attorney General v. Atlantic Coast Line Ry. 52 Fla. 646, 41 South. Rep. 705; Town of Brooksville v. Florida Telephone Co., 81 Fla. 436, 88 South. Rep. 307; 20 C. J. 330; Union Dry Goods Co. v. George Public Service Corporation, 248 U. S. 372, 39 Sup. Ct. Rep. 117; Union Dry Goods Co. v. Georgia Public Service Corp., 142 Ga. 841, 83 S. E. Rep. 946; Penney & Boyle Co. v. Los Angeles Gas & Electric Corp., 168 Cal. 12, 141 Pac. Rep. 620, L. R. A. 1915C 282, Ann. Cas. 1915D 471; Village [fol. 731] of Kilbourn City v. Southern Wisconsin Power Co., 149 Wis. 168, 135 N. W. Rep. 499; City of Scranton v. Public Service Commission, 268 Pa. 192, 110 Atl. Rep. 775; Woodburn v. Public Service Commission, 82 Ore. 114, 161 Pac. Rep. 391; State ex rel. City of Billings v. Billings Gas Co., 55 Mont. 102, 173 Pac. Rep. 799; People ex rel. Village of South Glens Falls v. Public Service Commission, 225 N. Y. 216, 121 N. E. Rep. 777; City of Sapulpa v. Oklahoma Natural Gas Co., 79 Okla. 196, 192 Pac. Rep. 224; Knoxville Gas Co. v. City of Knoxville, 261 Fed. Rep. 283; Salt Lake City v. Utah Light & Traction Co., 52 Utah 210, 173 Pac. Rep. 556, P. U. R. 1918F 377, 3 A. L. R. 715, and Notes; Woodburn v. Public Service Commission, 82 Ore. 114, 161 Pac. Rep. 391 Ann. Cas. 1917E 996; Puget Sound Traction, Light & Power Co. v. Reynolds, 244 U. S. 574, 37 Sup. Ct. Rep. 705.

In Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 65 L. Ed. 764, 41 Sup. Ct. Rep. 400, the laws of the State conferred upon the city "the continuing power to regulate rates and forbad any abridgement of the power by ordinance, resolution or contract." It was held that under these State laws the city was not authorized to make a contract fixing rates for a term of years, therefore the contract, lacking in mutuality, was void, and reasonable rates could be demanded. In City of New Orleans v. O'Keefe, 280 Fed. Rep. 92, where the constitution of Louisiana provided that "the exercise of the police power of the State shall never be abridged," it was held the city could not make a binding contract for rates. State v. City of New Orleans, 151 La. 24, 91 South. Rep. 533.

In San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 65 L. Ed. 777, 41 Sup. Ct. Rep. 428, the city "was vested with the rate regulating power and forbidden to restrict it by contract." There being no valid contract, a reasonable rate was proper.

See Houston v. Southwestern Bell Telephone Co., 259 U. S. 318, 66 L. Ed. 961, 42 Sup. Ct. Rep. 486. See also City and County of Denver v. Stenger, 277 Fed. Rep. 865; City of Lead v. Western Gas & Fuel Co., 44 S. Dak. 510, 184 N. W. Rep. 244; O'Keefe v. [fol. 74] City of New Orleans, 273 Fed. Rep. 560; City of New Orleans v. O'Keefe, 280 Fed. Rep. 92; Opelika Sewer Co. v. City of Opelika, 280 Fed. Rep. 155.

In Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, text 541-2, 41 Sup. Ct. Rep. 400, it is said: "Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations, Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; Smyth v. Ames, 169 U. S. 466; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442; Knoxville v. Knoxville Water Co. 212 U. S. 1, 17; Willcox v. Consolidated Gas Co., 212 U. S. 19, 41; Minnesota Rate Cases, 230 U. S. 352, 434; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655; Des Moines Gas Co. v. Des Moines, 238 U. S. 153; Denver v. Denver Union Water Co., 246 U. S. 178, 194; and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial. Freeport Water Co. v. Freeport, 180 U. S. 587, 593; Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437; Cleveland v. Cleveland City Ry. Co., 194 U. S. 517; Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273; Minneapolis v. Minneapolis Street Ry. Co., 215 U. S. 417; Columbus Railway, Power & Light Co. v. Columbus, 249 U. S. 399."

While Section 8, Article VIII of the Constitution expressly authorizes the legislature to prescribe the jurisdiction and powers of municipalities, yet any authority given a city by the legislature to make contracts for public service rates is subject to the organic provision that "the legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and [fol. 75] excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature." Sec. 30, Art. XVI, Constitution.

There is, in this State, no provision of controlling law, expressly forbidding irrevocable contracts or other abridgments of the police power as is prescribed in the States of Iowa, Texas, Louisiana and other States, as shown by the authorities above cited (City and County of Denver v. Stenger, 277 Fed. Rep. 865, text 871). The above quoted Section 30 of Article XVI does not forbid the legislature to authorize the cities of the State to enter into term contracts for service rates with public utility corporations; but the quoted

organic provision merely makes such contracts that are otherwise valid and binding, subject to the "full power" of the legislature to provide for fixing just and reasonable rates in the premises. This is the decision in City of Tampa v. Tampa Water Water Co., 45 Fla. 600, 34 South. Rep. 631; Tampa Water Works Co. v. Tampa, 199 U. S. 241, 26 Sup. Ct. Rep. 23; State ex rel. Triay v. Burr, 79 Fla. 290, 84 South. Rep. 61 and other similar cases above cited. Town of Brooksville v. Florida Tel. Co., 81 Fla. 436, 88 South. Rep. 307. In City of Wagoner v. South Dakota Light & Power Co.,— S. D.—, 193 N. W. Rep. 129, the city had authority to regulate rates, therefore it was the duty of the city to prescribe reasonable rates and it could not enforce confiscatory rates. See also City and County of Denver v. Stenger, 277 Fed. Rep. 865.

The appellant contends that as Section 30, Article XVI, of the Constitution provides that "the legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged" in performing "services of a public nature," which organic provision makes all contracts for rendering public services subject to the power of the legislature to regulate the rates to be charged for such service, therefore neither the legislature nor a municipality can have the power to make a binding contract for such [fol. 76] public service rates. But the constitution does not expressly forbid irrevocable contracts or other abridgments of the police power, as in Louisiana and other States. If the constitution of Florida did so provide, there might be a basis for argument that municipalities in this State cannot make binding rate contracts with public utility companies. The power to pass laws to regulate rates is invested in the legislature, which power may be exercised through a municipality; and conceding that the power to regulate rates excludes the power to contract for continuing rates, such power to regulate the rates here involved has not been given the city; and the power of a city to make binding contracts in the premises until the city has been authorized to regulate the rates has been held in the City of Tampa v. Tampa Water Works Co., 45 Fla. 600, 34 South. Rep. 631.

As under Section 8, Art. VIII, of the Constitution, the legislature may prescribe the jurisdiction and powers of municipalities, and as the constitution and statutes of the State do not make it unlawful for municipalities to enter into contracts for public service rates, it must be determined whether the legislature had by charter authority or other statute vested the City of Palatka with power to enter into the asserted contract here sought to be enforced. If no such authority has been given, the alleged contract is without force or efficacy.

Municipalities are established by law for the purposes of government. Their functions are performed through appropriate officers and agents, and they can exercise only such powers as are legally conferred by express provisions of law, or such as are, by fair implication and intendment, properly incident to or included in the

powers expressly conferred for the purpose of carrying out and accomplishing the object of the municipality. Powers that are indispensable to the declared objects and purposes of a municipality may be inferred or implied from powers expressly given that are fairly subject to such construction. The difficulty of making specific enumeration of all such powers as the legislature may intend to municipal corporations renders it necessary to confer some power [fol. 77] in general terms. The general powers given are intended to confer other powers than those specifically enumerated. General powers given to a municipality should be interpreted and construed with reference to the purposes of the corporation. Where particular powers are expressly conferred and there is also a general grant of power, such general grant by intendment includes all powers that are fairly within the terms of the grant and are essential to the purposes of the municipality, and not in conflict with the particular powers expressly conferred. The law does not expressly grant powers and impliedly grant others in conflict therewith. If reasonable doubt exists as to a particular power of a municipality, it should be resolved against the city; but where the particular power is clearly conferred or is fairly included in or inferable from other powers expressly conferred, and is consistent with the purposes of the municipality and the powers expressly conferred, the exercise of the power should be resolved in favor of the city so as to enable it to perform its proper functions of government.

Among the usual functions of a municipal government are those of granting privileges in the use of its streets for the purpose of rendering service of a public nature, such as furnishing the municipality and its inhabitants service necessary or useful for the common welfare of all. The furnishing of water for use and for fire protection is a service necessary or useful for the individual and collective well-being of a city and its inhabitants. Authority to make provisions within lawful limitations for securing or furnishing to a city and its inhabitants an abundant supply of good water for all purposes, is a usual and necessary power of a municipality, and such power may be included in powers given in general terms, where there is nothing in the enumeration of particular powers conferred to limit in this particular the operation of the general powers conferred. Porter v. Vinzant, 49 Fla. 213, 38 South. Rep. 607; Mernaugh v. City of Orlando, 41 Fla. 433, 27 South. Rep. 34.

Unless expressly or impliedly restrained by statute, a municipal [fol. 78] corporation has a discretion in the choice of means and methods for exercising the powers given to it for governmental or public purposes, and the usual limitations upon the actions of municipalities within their legal powers are good faith and reasonableness, not wisdom or perfection. Jacksonville Electric Co. v. City of Jacksonville, 36, Fla. 229, text 271, 18 South. Rep. 677.

Where action is taken by a municipality in the exercise of its powers, the methods used will not be controlled by the courts where there is no abuse of power or discretion. All doubts as to the propriety of means used in the exercise of an undoubted municipal

power will be resolved in favor of the municipality. State ex rel. Ellis v. Tampa Water Works Co., 56 Fla. 858, 47 South. Rep. 358.

The general charter powers of a municipality usually relate to governmental functions as distinguished from business powers; and such general powers are designed to confer authority that is not expressly or specifically conferred and is essential or expedient to accomplish the purposes for which the municipality is organized. Where the exercise of particular governmental powers may be fairly included in and authorized by general powers conferred upon municipalities, the rule expressio unins est exclusio alterius, is not generally applied to specific powers conferred to exclude powers that serve the purposes for which municipalities are organized, where such powers are not inconsistent with other powers conferred or with limitations imposed by the charter or by statute upon the municipal powers. When a municipality undertakes to exercise powers of a business nature, as distinguished from governmental functions, the authority for such exercise should clearly appear by express provisions or by reasonably certain implication from other powers conferred, and should be in entire consonance with the purposes for which the municipality was created. In determining whether a particular business power may be implied from express powers conferred, the rule, expressio unius est exclusio alterius, as other rules of interpretation, may in proper cases be applied to ef- [fol. 79] fectuate the legislative intent in conferring municipal powers.

It appears that the municipality had statutory authority to "pass ordinances that may be necessary and expedient for the good government of said town, and for the preservation of the public peace, health, and morals: Provided, however, they are not inconsistent with the Laws or Constitution of this State or the United States; they shall especially have power to regulate, alter, and improve and extend the streets, lanes and avenues of said town, or to lay out and establish and open new streets, and to cause obstructions and encroachments to be removed * * * and to do and perform all such other act or acts as shall seem necessary and best adapted to the general interests of said town." (Sec. 11, Chap. 492, Acts 1852), "to provide for the lighting of streets of the city or town" (Sec. 1041, Gen. Stats. 1906, Sec. 1868, Rev. Gen. Stats. 1920), "to regulate, improve, alter, extend and open streets, lanes and avenues" (Sec. 1915, Gen. Stats. 1906, Sec. 1843, Rev. Gen. Stats. 1920).

Ordinance contracts for supplying the city and its inhabitants with lights, is a usual and necessary function of a municipality, and authority to make such contracts may be included in powers given in general terms, where such power is not in conflict with specific powers conferred. See State ex rel. Ellis v. Tampa Water Works Co., 56 Fla. 858, 47 South. Rep. 358.

The above quoted general statutory powers of the city are sufficient to confer upon the city authority to make a franchise contract with provisions as to rates to be charged individuals for electric lights of the character of the one in controversy; such contract is

consistent with the express power "to provide for the lighting of streets of the city," and is not repugnant to or inconsistent with any specific or general statutory power of the city. See City of Tampa v. Tampa Water Works Co., 45 Fla. 600, 34 South. Rep. 631; State ex rel. Ellis v. Tampa Water Works Co., 56 Fla. 858, 47 South. Rep. 358. The contract does not grant exclusive franchise privileges. Capital City Light & Fuel Co. v. City of Tallahassee, 42 [fol. 80] Fla. 462, 28 South. Rep. 810; Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 22 Sup. Ct. Rep. 866.

In Hyatt v. Williams, 148 Cal. 585, 84 Pac. Rep. 41, the specific charter powers were "to provide for and regulate lighting streets, avenues and public places and to provide for such lights as are necessary for the convenient transaction of public business," and it was held that the terms of the express grant of power to provide lighting for the public purposes named do not indicate any intention to give the distinct and larger power to establish a plant (involving taxation), for furnishing lighting for private use to all the inhabitants of the city who may desire it. See also Christensen v. City of Fremont, 45 Neb. 160, 63 N. W. Rep. 364; Village of Ladd v. Jones, 61 Ill. App. 584.

Erecting or establishing or procuring and operating a public utility plant may be a corporate or business function, while contracting, in connection with a franchise grant to a public service corporation, for service of a public nature to its inhabitants, may be a governmental power of a municipality.

Authority to make the contract for rates in this case is afforded by the general provisions conferred upon the city. Such authority is not inconsistent with special powers given the city, and is not in derogation of any State law or rule of public policy in this State.

There being a contract fixing rates for electricity to be furnished by the utility company, and the legislature not having authorized the city or any other governing body to regulate such rates the question as to whether the contract rates are remunerative, is immaterial, and the contract controls until the legislature does act in the premises. Columbus Ry. Power & Light Co. v. City of Columbus, Ohio, 249 U. S. 399, 63 L. Ed. 669, 39 Sup. Ct. Rep. 349, P. U. R. 239, 6 L. R. A. 1648; City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. Rep. 756; Lenawee County Gas & Electric Co. v. City of Adrian, 209 Mich. 52, 176 N. W. Rep. 590, 10 A. L. R. 1328; Miami Gas Co. v. Highleyman, 77 Fla. 523, 81 South. Rep. 775, and other authorities above cited; see also City [fol. 81] of Moorhead v. Union Light, Heat & Power Co., 255 Fed. Rep. 920; Hillsdale Gaslight Co. v. City of Hillsdale, 258 Fed. Rep. 485; Knoxville Gas Co. v. City of Knoxville, 253 Fed. Rep. 217.

Affirmed.

West and Terrell, JJ., concur.

Taylor, C. J., and Ellis and Browne, JJ., concur in the opinion.

[File endorsement omitted]

IN SUPREME COURT OF FLORIDA

[Title omitted]

PETITION FOR REHEARING AND ORDER OVERRULING SAME—Filed Jan. 14, 1924

Southern Utilities Company, a corporation, respectfully petitions the Court for a rehearing of the above entitled cause, and assigns as grounds therefor the following:

1. In its opinion filed in said cause the Court holds that the municipality was authorized by the legislature to make the contract fixing maximum rates to be charged and paid for electric current furnished to the municipality or to its inhabitants. In previous decisions, referred to and approved in said opinion, this Court has held that the impairment clauses of the State and Federal Con- [fol. 82] stitutions (Sec. 12, Decl. Rights, and Sec. 10, Art. 1, cl. 1, respectively), do not apply to such a contract because of the existence of the continuing power in the legislature conferred by Section 30 of Article XVI, of the Florida Constitution. This case is distinguished from the decisions referred to upon the solitary fact that the said legislative power has not been exercised in the case of the particular municipality with respect to electric current. To emphasize, we repeat, with great respect, that this case differs no whit from those in which decreases or increases of franchise rates have been justified and sanctioned by this Court, except that in those cases the legislature had delegated to a city council or to the Railroad Commission its power under said last mentioned section of the Constitution to change such rates. If these statements are correct, and it must be true that they are, then it is demonstrated beyond any possible question, that the test this Court has, inadvertently, we think, committed itself to for ascertaining the enforceability of franchise rates is the exercise instead of the existence of the particular power. By that test which, presumably, will remain in force indefinitely, municipalities are as effectively bound to rates unreasonably high as are the utility companies to rates unreasonably low. Such a test, we most respectfully submit, is susceptible of well known and judicially recognized abuses, and widely opens the door for the practice of the very evils which lie at the foundation of the now universal principle that governments are powerless to contract or barter away their governmental powers. It is patent from a reading of the opinion that such an effect was not in the contemplation of the Court and was not given consideration, and that fact, in the light of the very great public concern in the question involved, it seems to your petitioner, calls for a full rehearing and reconsideration.

2. The Court, in its opinion, has apparently overlooked the outstanding and undeniable fact that Section 30 of Article XVI of the

Florida Constitution, or the continuing power to decrease rates charged for public services vested in and to be exercised by the [fol. 83] legislature independently of that section, is of no greater force or efficacy than other protective provisions of the Constitution. It is not to be questioned that the Courts "shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay" (Fla. Const., Dec. Rights, Sec. 4), or that "No person shall * * * be deprived of * * * property without due process of law; nor shall private property be taken without just compensation" (Id. Sec. 12), or that the legislature is powerless to pass "any law impairing the obligation of contracts" (Id. Sec. 17). In giving full effect to a so-called contract fixing a maximum rate to be charged and paid for electric current furnished to a municipality or to its inhabitants, and at the same time and by the same opinion, preserving the power in the legislature to impair whatever obligation is represented by the so-called contract, the court, it is most respectfully submitted, has overlooked the other mentioned protective clauses of the Florida Constitution and similar provisions of the Federal Constitution. Stated differently, if the contract is not protected from impairment by the legislature, as the Court has distinctly held and reiterated, then by the same token and for the same reason and by virtue of another provision of the same organic and fundamental law, the property of the appellant should not be taken, as is admittedly being done, without just compensation. We submit that if the Court did not, as it would appear from a reading of the opinion, take this question into consideration, a rehearing should be granted and the question fully examined.

3. The Court has apparently overlooked the fact, as we contend, that in dealing with a municipality, a utility company is dealing with the agent of the legislature. Municipalities, so the Court holds, have and can exercise only such powers as are conferred by the legislature. An attempted exercise of a power not conferred does not bind the legislature—the principal. If, then, in this case, the contract was authorized, as the Court holds, can it be further held and supported by reason, that the principal—the legislature—can [fol. 84] later set the contract aside? When the previous decisions of this Court are analyzed, it becomes self-evident that they are inextricably intertwined with the single dominant and all-pervading thought that within the meaning and intent of the Constitution there is no contract. We submit, with the utmost respect, that in the opinion here the Court has attempted to preserve the effect of its previous decisions while denying to this appellant a protection under those decisions, and in so doing has inadvertently adopted a rule which finds its only logical support in a reason which, carried to its inevitable conclusion, destroys and strikes down the foundation upon which the said decisions are constructed, namely, that there was no contract immune from impairment. For this reason, it is submitted that there should be a rehearing of the case, and the

particular matter re-examined, in order that the effect of the opinion upon the previous decisions referred to may be fully considered.

4. In its opinion the Court has drawn such a theoretical difference between the power to regulate rates and the power to fix rates as, in practical application, amounts to the finding of a power from the absence of such power. If, as the Court holds, the particular municipality has power to fix rates by contract, that includes the power to change the rates by the same process, namely, passage and acceptance of an ordinance.

Respectfully submitted, J. T. G. Crawford, W. B. Crawford, Counsel for Appellant.

---

On the 28th day of January, 1924, the said Supreme Court of Florida ordered that the foregoing petition for a rehearing of said cause be denied, the said order being in the words and figures as follows:

[fol. 85] IN SUPREME COURT OF FLORDIA

[Title omitted]

OPINION ON PETITION FOR REHEARING

Per CURIAM:

The opinion of the Court draws no "theoretical difference between the power to regulate rates and the power to fix rates." 28 C. J. 574. Reference is made to rates fixed by the contract and the absence of legislative authority to regulate the particular rates complained of, which authority to regulate the rates, the legislature may exercise at any time under the power to do so that is reserved to the State and conferred by Section 30 of Article 16 of the Constitution upon the legislature, to be exercised in its discretion. The "existence" of power to regulate such rates is in the legislature under Section 30, Art. 16 of the Constitution; and the legislature may "exercise" the reserved and vested power notwithstanding a contract rate. The reserved legislative power to regulate rates irrespective of contracts fixing or prescribing rates, does not deprive municipalities of the power to contract for rates within its charter powers. The reserved legislative power to regulate rates merely makes all contract rates subject to regulation notwithstanding the contract, and the power being reserved to change contract rates, a change duly made does not violate the obligation of the contract. 176 N. W. 590, 10 A. L. R. 1328; L. R. A. 1917C 98. As between the municipality and the public utility company, contract rates are binding if duly stipulated for (Miami Gas Co. v. Highleyman, 77 Fla. 523, 81 South. Rep. [fol. 86] 775; 28 C. J. 575); but the legislature may at any time regulate the rates by due course of law. Town of Brooksville v. Florida Tel. Co., 81 Fla. 436, 88 South. Rep. 307.

The legislature, in authorizing municipalities to contract for rates, and municipalities in making the authorized contracts, do not "contract or barter away their governmental powers." Such authority to contract may be conferred under Section 8, Article 8, or Section 24 of Article 3 of the Constitution, subject to the reserved power of the legislature under Section 30, Article 16 of the Constitution to regulate the contract rates, by increasing or decreasing or otherwise changing them as the public welfare may require. It is not claimed that the legislature has exercised its reserved power to regulate the rates here considered. The right to regulate exists in the legislature; but this alone does not destroy the right to contract for rates. And the contract rates cannot legally be ignored except by consent of the parties thereto, or by legislative authority duly exercised. See 128 N. E. Rep. 58; 225 N. Y. 216.

Rehearing denied.

Whitfield, P. J., and West and Terrell, JJ., concur.

Taylor, C. J., and Ellis and Browne, JJ., concur in the opinion.

---

[fol. 87] IN SUPREME COURT OF FLORIDA

JUDGMENT—Filed Feb. 1, 1924

To the honorable the Judge of the Circuit Court for the Eighth Judicial Circuit of Florida, Greeting:

Whereas, lately in the Circuit Court of the Eighth Judicial Circuit of Florida, in and for the County of Putnam, in a cause wherein City of Palatka, a municipal corporation, was complainant, and Southern Utilities Company, a corporation, was defendant, the decree of said Circuit Court was rendered October 30th, 1922, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the State of Florida, by virtue of an appeal, agreeably to the laws of said State in such case made and provided, fully and at large appears:

And whereas, at the June Term of said Supreme Court holden at Tallahassee, A. D. 1923, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the twenty-first day of December, A. D. 1923, it was considered by said Supreme Court that the said decree of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant its costs by it in this behalf expended, which costs are taxed at the sum of — dollars; therefore,

You are hereby commanded that such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court and the laws of the State of Florida, ought to be had.

Witness, the Honorable R. Fenwick Taylor, Chief Justice of said Supreme Court and the seal of said Court at Tallahassee, this first day of February, 1924.

G. T. Whitfield, Clerk Supreme Court of Florida. (Seal of the Supreme Court.)

---

[fol. 88] IN SUPREME COURT OF FLORIDA

[Title omitted]

CLERK'S CERTIFICATE

I, G. T. Whitfield, Clerk of the Supreme Court of the State of Florida, do hereby certify that the foregoing, consisting of 87 numbered pages, is a true and complete transcript of the record, in the cause above entitled, on an appeal to this Court from the Circuit Court of the Eighth Judicial Circuit of the State of Florida, in and for Putnam County, Florida, together with true and complete copies of the proceedings in this Court, including the opinion of this Court thereon, the motion of said appellant for a re-hearing of said cause, the opinion and order of this Court denying the said motion for a rehearing, and the final order and mandate of this Court affirming the judgment of said Circuit Court.

In witness whereof I have hereunto set my hand and affixed the seal of the Court at Tallahassee, Florida, this 17th day of March, A. D. 1924.

G. T. Whitfield, Clerk of the Supreme Court of the State of Florida. (Seal of the Supreme Court of Florida.)

---

[fol. 89] IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

ORDER GRANTING PETITION FOR CERTIORARI—Filed April 21, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Florida, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

No. 339

# In the Supreme Court of the United States

October Term 1923

SOUTHERN UTILITIES COMPANY,
*Petitioner,*

vs.

CITY OF PALATKA, FLORIDA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND BRIEF FOR PETITIONER IN SUPPORT THEREOF

J. T. G. CRAWFORD,
WM. B. CRAWFORD,
*Counsel for Petitioner.*

# In the Supreme Court of the United States

**October Term 1923**

SOUTHERN UTILITIES COMPANY, a corporation, *Petitioner,*

vs.

CITY OF PALATKA, a municipal corporation, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To the Honorable *The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, SOUTHERN UTILITIES COMPANY, a corporation of Florida, respectfully shows:

1. In 1914 the respondent granted to the petitioner a non-exclusive franchise to supply electric current to the respondent and its inhabitants, for thirty years, at a specified maximum rate.

2. Finding said rate inadequate to yield any return, due to changed economic conditions brought about by the late war, the petitioner put an increased rate into effect.

3. The respondent then applied to the appropriate state court for a mandatory injunction upon the theory that the rate provision of the franchise amounted to a contract obligation.

4. The petitioner justified by pleading in defense that under section 30 of article 16 of the state constitution there was no mutual obligation respecting the specified rate, and that the enforcement of the injunction would result in (a) the confiscation of its property without compensation, and (b) the deprivation of its property without due process of law, and (c) the denial to it of the equal protection of the laws.

5. The specified maximum rate is admitted on the record to be confiscatory.

6. A permanent injunction was granted by the trial court, and, upon appeal, was affirmed by the Supreme Court of Florida.

7. The Supreme Court of Florida is the state court of last resort.

8. The effect of the cited provision of the state constitution is to irrevocably vest in the legislature the continuing power to reduce or increase rates for services of a public nature *notwithstanding any contract fixing such rates.* Franchise rates for water were reduced in *Tampa Waterworks Company v. Tampa,* 45 Fla. 600—affirmed by this Court 199 U. S. 241. Franchise rates for telephones were increased in *Brooksville v. Florida Telephone Com-*

*pany*, 81 Fla. 436. Franchise rates for street car fares were increased in *Triay v. Burr*, 79 Fla. 290.

9. The solitary distinguishing fact between the foregoing cases and the instant case is that in those cases the legislature had delegated to some governmental agency the power to *regulate* the rates involved, while here there has been no such delegation.

10. The petitioner's proposition is that if the rate provision of the franchise is not a contract obligation protected from impairment by the legislature directly, or through delegation to an agency, of its regulatory power, then mutuality of obligation is lacking and such rate cannot be enforced to the prejudice of the petitioner in its constitutional rights seasonably pleaded.

11. The case presents a question of vital importance to the public utility companies in Florida supplying electricity and gas to municipalities, and to the municipalities and their inhabitants being supplied, as there has been no general legislative regulation, or delegation of power to regulate, such rates. As the petitioner is now being compelled to supply its product at a loss because of a franchise rate fixed in an era of low costs, so will the municipalities and their inhabitants be compelled indefinitely to pay rates fixed in the present era of high costs.

12. The decision of the Supreme Court of Florida is essentially rested upon the fictitious issue of the *exercise* or *non-exercise* of the admitted irre-

vocable governmental power to regulate *notwithstanding a contract.*

13. Unless the distinction pointed out in paragraph 9 above is sound, then the decision of the Supreme Court of Florida is in conflict with the decision of the Circuit Court of Appeals for the Circuit in which Florida is situated, and with the decisions of this Court. *City of New Orleans v. O'Keefe* (C. C. A. Fifth Circuit), 280 Fed. 92; *Tampa Waterworks Co. v. Tampa,* 199 U. S. 241; *Southern Iowa Electric Co. v. Chariton,* 255 U. S. 539; *San Antonio v. San Antonio Public Service Co.,* 255 U. S. 547; *Ortega Company v. Triay, receiver,* not yet officially reported. The said decision is likewise in conflict with the decision of the United States District Court for the District in which the litigation arises. *Southern Utilities Co. v. Palatka,* see copy of unreported opinion appended hereto.

14. The petitioner, in the adjoined brief, has more particularly elaborated its contentions.

15. As part of this application there is exhibited a certified copy of the record, including all the proceedings in the Supreme Court of Florida.

WHEREFORE, the petitioner respectfully prays that a writ of *certiorari* be issued under the seal of this Court, directed to the Supreme Court of the State of Florida, sitting at Tallahassee, Florida, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all the proceedings of said Su-

preme Court of Florida had in the said cause, to the end that said cause may be reviewed and determined by this court as provided by law, and that said judgment of said Supreme Court of Florida be reversed, and for such further relief as may seem proper.

And your petitioner will ever pray.

.....

.....

*Counsel for Petitioner.*

STATE OF FLORIDA,
DUVAL COUNTY.

J. T. G. CRAWFORD, being first duly sworn, says that he is one of counsel for Southern Utilities Company, the petitioner; that he prepared the foregoing petition, and that he verily believes that the allegations thereof are true.

.....

Sworn to and subscribed before me this..... day of March, A. D. 1924.

.....

*Notary Public State of Florida.*

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

SOUTHERN UTILITIES COMPANY
vs.
CITY OF PALATKA, et al.

CALL, DISTRICT JUDGE.

This cause comes on for a hearing upon the application of the complainant for a temporary restraining order, upon the bill of complaint, answer thereto and the exhibits made a part of each pleading.

The theory of the bill is that the present rate of remuneration allowed by the ordinance for furnishing gas to its patrons in the City of Palatka is confiscatory.

The answer relies in one aspect on the claim that the ordinance fixing the rates is a contract, and therefore it is of no moment whether the rate is confiscatory or not.

The Constitution of the State of Florida, Sec. 30, Art. XVI, places the power to fix rates in the Legislature. As decided in the Tampa Water Works case in 45th Florida, the Legislature may delegate this power to a municipality, but then it is subject to the power vested in the Legislature by this Section, and the act of either Legislature or Common Council is not binding upon a subsequent body. Therefore the contract idea is untenable. In the case of the City of Palatka the power to fix the rates

for furnishing gas has not been delegated by the legislature. This brings this case clearly with the principles decided by the Supreme Court of the United States in several cases decided on April 11th, 1921, advance sheets May 15, 1921, pages 514 and 518.

The answer denies that the rates are confiscatory and sets up facts which if established at the hearing would result in a denial of permanent injunction, but viewing the application in the light as to which of the parties would be most damaged by a granting or refusal of the order sought, I think undoubtedly the complainant would be the greater sufferer, in that in the event the complainant should prevail there would be no way it could recover the compensation over and above the rate allowed by the ordinance, whereas, on the other hand, should the defendant prevail, the sum collected over and above the rate allowed by the ordinance could be easily collected from the bond which will be required from the complainant on the issuance of the temporary injunction.

It will be ordered that the temporary injunction issue as prayed, upon the complainant giving a bond with sufficient sureties to be approved by the Clerk of this Court in the penal sum of ten thousand dollars ($10,000.00), conditioned that the complainant shall keep a correct set of books, showing all amounts received for furnishing gas to the consumers in Palatka, Florida, from whom received, and date of the receipt of the amounts, and shall pay all costs and damages which may be suffered by the defendants herein, or either of them, and to repay to each

of the consumers of gas in the City of Palatka, Florida, any amounts which said consumers shall have paid to complainant over and above the rate allowed by the ordinance, in the event such rate shall be found to be reasonable.

(Signed) R. M. CALL,
*Judge.*

At Jacksonville, Florida, this December 17th, 1921.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

SOUTHERN UTILITIES COMPANY, a corporation, *Petitioner,*
vs.
CITY OF PALATKA, a municipal corporation, *Respondent.*

BRIEF ON PETITION FOR WRIT OF CERTIORARI.

In support of the foregoing petition we refer to the statement of this Court in *Southern Iowa Electric Co. v. Chariton,* 225 U. S. 539, that:

> "Two propositions are indisputable:
>
> "(a) That although governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations;
>
> "(b) That where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contracts rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract,

and therefore the question of whether such rates are confiscatory becomes immaterial."

The petitioner's contention is that by reason of Section 30 of Article XVI of the Florida Constitution, Florida falls within the first stated proposition.

The provision in question is as follows:

> "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

We point out that notwithstanding franchise contracts fixing rates, the Florida Supreme Court has used this constitutional provision in justification of both lowering and raising such rates. Cases cited in paragraph 8 of the petition.

A reading of the opinion of the Florida Supreme Court in this case is conclusively convincing that if the respondent, or any other agency of the legislature, had been granted power to regulate the rate in question, the petitioner could get relief from the admitted confiscation of its property. In other words, that the contract would not then bind the

petitioner to continue its service at confiscatory rates.

It is thus demonstrated that petitioner's fundamental rights are defeated by the mere failure of the legislature to exercise, or to delegate, its power to regulate. The answer made by the Supreme Court of Florida to this statement—that petitioner is bound by a valid contract—is unconvincing and unreasonable. See grounds 1 and 3 of motion for rehearing, record pages 81, 83. If there is a mutual contract obligation here, then there was an identical obligation in the cases referred to, where the rates were decreased, and increased.

Judge Call expresses our contention thus:

> "The answer relies, in one aspect, on the claim that the ordinance fixing the rates is a contract, and therefore, it is of no moment whether the rate is confiscatory or not. The Constitution of the State of Florida, Sec. 30, Art. XVI, places the power to fix rates in the legislature. As decided in the Tampa Water Works case in 45th Florida, the legislature may delegate this power to a municipality, but then it is subject to the power vested in the legislature by this section, and the act of either legislature or common council is not binding upon a subsequent body. Therefore the contract idea is untenable."

It cannot be disputed that under the Constitution

of Florida the power to regulate is in the government at all times. The circumstance that the power may be exercised by one governmental agency or another, or may not be exercised at all, ought not, in reason, control the question whether the franchise provision fixing rates is a contract obligation. It is quite clear that the Florida Supreme Court is committed unmistakably to the proposition that the power to regulate cannot be defeated by contract. Can that be admitted without definitely placing Florida within the rule of proposition (a) as stated by this Court, and as definitely taking Florida out of the rule of proposition (b).

The holding of the Supreme Court of Florida in this case amounts to this: that a rate fixed in a franchise is a contract obligation or is not a contract obligation, to be determined by the action or inaction of the government in the exercise of its power to regulate.

To procure uniformity of decision, to protect large property rights from confiscation, to secure the inhabitants of many cities and towns in Florida in their right to purchase public services at reasonable rates, and for other apparent reasons, it is most respectfully submitted that the decision of the Florida Supreme Court should be reviewed by this Court.

.....

.....

*Counsel for Petitioner.*

# In the Supreme Court of the United States

**October Term 1924**

**No. 339**

---

SOUTHERN UTILITIES COMPANY,
a corporation,
Petitioner,
vs.
CITY OF PALATKA.

## BRIEF FOR PETITIONER

W. B. CRAWFORD,
J. T. G. CRAWFORD,
Of Counsel.

THE DAILY PRESS, JACKSONVILLE, FLA.

# In the Supreme Court of the United States

**October Term 1924**

SOUTHERN UTILITIES COMPANY, a corporation,
Petitioner,
vs.
CITY OF PALATKA.
No. 339.

## BRIEF FOR PETITIONER

### STATEMENT OF THE CASE

1. In 1914 the City granted to the petitioner a non-exclusive franchise to supply electric current to the City and its inhabitants, for thirty years, at a specified maximum rate. (R. 5).

2. Finding said rate inadequate to yield any return, due to changed economic conditions brought about by the late war, the petitioner put an increased rate into effect.

3. The City then applied to the appropriate state court for a mandatory injunction upon the theory that the rate provision of the franchise amounted to a contract obligation. (R. 1).

4. The petitioner justified by pleading that under Section 30 of Article 16 of the State Constitu-

tion there was no mutual obligation respecting the specified rate, and that the enforcement of the injunction would result in (a) the confiscation of its property without compensation, and (b) the deprivation of its property without due process of law, and (c) the denial to it of the equal protection of the laws. (R. 24).

5. This plea was held insufficient and a permanent injunction was granted by the trial court and, upon appeal was affirmed by the Supreme Court of Florida. (R. 31, 45).

6. The provision of the Florida Constitution in question is as follows:

> "The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

## ERROR RELIED UPON

The petitioner contends that the effect of the quoted Section of the Florida Constitution is to irrevocably vest in the legislature the continuing power to reduce or increase rates for services of a public nature, *notwithstanding any contract or ordinance fixing such rates,* and that the Florida Supreme

Court committed error demanding reversal in holding that the rates fixed are binding, regardless of whether they are confiscatory, so long as the legislature does not exercise its power under the Constitution.

## ARGUMENT

The petitioner's proposition is that if the rate provision of the franchise ordinance is not a contract obligation in the sense that the legislature cannot change it in the exercise of the power conferred by the Constitution, then mutuality of obligation is lacking and the rate cannot be enforced to the prejudice of the petitioner.

In Tampa Waterworks Company vs. Tampa, 45 Fla. 600—affirmed by this Court, 199 U. S. 241,—there was involved a contract fixing maximum water rates. Subsequent to the date of the contract the legislature delegated to the City of Tampa its power to regulate water rates. The City then reduced the rates and the Waterworks Company sought an injunction on the proposition that the rate provision of the franchise amounted to a contract, the obligation of which could not be impaired by the later exercise of the power to regulate. The contention was denied and the reduced rates enforced—there being no contention or showing that their enforcement resulted in confiscation.

Later decisions by the Florida Supreme Court wherein rates were increased are Brooksville vs.

Florida Telephone Co., 81 Fla. 436, and Triay vs. Burr, 79 Fla. 290.

The only possible differentiating circumstance between these three cases and the instant case lies in the fact that here the legislature has made no delegation of its power to regulate, either to the City or to any other agency. This circumstance must supply the reason to support the Supreme Court of Florida in reaching a conclusion in this case directly opposite from its conclusions in the other cases referred to. And, as we contend, the decision here is in conflict with San Antonio vs. San Antonio Public Service Co., 255 U. S. 547, Southern Iowa Electric Company vs. Chariton, 255 U. S. 539 and Ortega Company vs. Triay, 260 U. S. 103. In Southern Iowa Electric Co. vs. Chariton, this Court said:

> "Two propositions are indisputable:
>
> "(a) That although governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations;
>
> "(b) That where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contracts rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

The petitioner's contention is that by reason of

Section 30 of Article XVI of the Florida Constitution, Florida falls within the first stated proposition.

In a broad sense it may be true, as the Florida Supreme Court holds, that the City has power to contract as to rates, but by reason of the power vested in the legislature by the Constitution such power is so qualified as to remove any contract as to rates from the operation of the rule of the second proposition above noted. This must be true, for the reason that mutuality is an essential of a binding contract obligation, and so long as the legislature, or the City under a delegation from the legislature, can change the rates at will notwithstanding a contract, there can be no such mutuality of obligation as is required. If the Florida legislature should now delegate the said power to regulate the rates in question, the mere delegation, without any attempt on the part of the City to exercise the power, would enable the petitioner to get relief from the confiscatory rates. That this is true is demonstrated by the telephone case and Triay vs. Burr, supra, where the legislative power under the Section of the Constitution in question had been delegated to the State Railroad Commission and the public service corporations had applied for rates greater than those fixed by the franchises under which they were operating.

We are mindful of the decision of this Court in Georgia Railway & Power Co. vs. Decatur, 262 U. S. 432. In that case the Georgia Supreme Court reached a conclusion which this Court followed, directly opposite to the conclusion reached by the Supreme Court of Florida in Triay vs. Burr, supra,

and, as we contend, in the instant case also. As there stated, this Court will determine for itself whether there is a contract and the extent of its obligations, and in arriving at its conclusions will lean to an agreement with the State Court. Except for the solitary distinguishing fact that the legislature has not delegated to the City, or any other agency, its power to control rates, the case here presented is identical with that presented in the Tampa Waterworks Co. vs. Tampa, supra. In that case this Court agreed with the Supreme Court of Florida and affirmed its decision. Now this Court is called upon to agree again with the Supreme Court of Florida, and unless the single distinguishing fact mentioned affords a sound reason this Court, in again agreeing with the Florida Supreme Court, will arrive at a conclusion directly opposite to that reached in the former case.

For the reasons stated, we respectfully submit that the decision of the Supreme Court of Florida should be reversed.

W. B. CRAWFORD,

J. T. G. CRAWFORD,

Counsel for Southern Utilities Company.

# In the Supreme Court of the United States

**October Term of 1924**

**No. 339**

SOUTHERN UTILITIES COMPANY,
a corporation,
Petitioner,

vs.

CITY OF PALATKA,

## BRIEF FOR RESPONDENT

J. J. CANON,
P. H. ODOM,
Of Counsel.

JACKSONVILLE PRINTING CO.

# In the Supreme Court of the United States

**October Term of 1924**

SOUTHERN UTILITIES COMPANY, a corporation, Petitioner,
vs.
CITY OF PALATKA, Respondent.

No. 339

## BRIEF FOR RESPONDENT

The statement of fact and of the error relied upon as contained in the petitioner's brief is substantially correct. It is agreed that the decision of the case at bar is based on the application of the law as announced by this court in the case of Southern Iowa Electric Company v. Chariton, 225 U. S. 439, which is as follows:

> "Two propositions are indisputable:
>
> "(a) That although governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations;
>
> "(b) That where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contracts rates to

> govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

The petitioner's contention is that the contract here in question falls within the first proposition advanced in the above quotation upon the theory that Section 30 of Article 16 of the Florida Constitution prohibits contracts between the State of Florida or any agency thereof, and any person or corporation furnishing a public utility fixing the rate or charge for such service.

The provision in question is in the words following:

> "The legislature is vested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

The respondent's contention, and the decision of the Supreme Court of Florida in this case, is that contracts made by a municipality and a public Utility Company fixing service rates for the furnishing of electricity are valid and binding contractual obligations so long as the legislature does not exercise its "full power to pass laws" for the regulation of the same.

In Southern Iowa Electric Company v. Chariton, quoted above, the Court had under consideration Section 725 of Iowa Code, relating to the powers of municipalities:

> "Sec. 725. Regulation of Rates and Service. They shall have power - - - to regulate and fix the rent or rates for water, gas, heat and electric light or power - - - and these powers shall not be abridged by ordinance, resolution or contract."

The distinct holding in the case was that contracts a[illegible] rates for the public service enumerated in this section of the Iowa Code were expressly prohibited, and came within the first proposition quoted. The Supreme Court of Iowa, however, in the case of Ottumwa Ry. & Light Co. v. Ottumwa, 173 N. W. 270, wherein the Court had under consideration a contract fixing the fare charged by a street railway, held that such contract did not come within the section of the Code and was a valid and binding contract, coming within the second proposition quoted. In the last cited case the Court used the expression:

> "Code 1897, 725, prohibiting abridgement by contract of the power to fix and regulate the rents or rates of water, gas, heat and electric light or power, authorizes the city to make contract unalterably fixing the rate of fare to be charged by street railroad for a certain period not manifestly too long, since such statute enumerating charges as to which such contract can not be made, sanctions contract as to street car fares not therein enumerated."

The legislature of the State of Florida has construed Section 30 of Article 16 of the Florida Constitution that there is vested in the legislature the power to regulate rates to be charged by "persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature," properly and only exercised by the Legislature acting

under its constitutional power to "pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges."

This construction has been demonstrated by the legislature passing laws for the regulation of the rates of Street Railroads, water companies, and telephone and telegraph companies.

Triay v. Burr, 79 Fla. 290, 84 So. 61;

Tampa v. Tampa Waterworks Company, 45 Fla. 600, 34 So. 631;

Brooksville v. Brooksville Telephone Co., 81 Fla. 463, 88 So. 307;

State ex rel. Ellis v. Tampa Waterworks Co., 56 Fla., 858, 47 So. 358.

Miami Gas Co. v. Highleyman, 77 Fla. 523, 81 So. 775.

It can not be contended that the furnishing of electric lighting was not a public utility at the time the legislature passed the laws for the regulation of the charges of the utilities mentioned in the preceding paragraph. It would seem, therefore, that the legislature of the State of Florida sanctions contracts as to the furnishing of electric lighting not therein enumerated, as the Iowa Legislature sanctions contracts not enumerated in Section 725 of the Iowa Code.

The Supreme Court of Florida has so construed the section of the Florida Constitution (Section 30 of Article 16) in all of the rate cases where this question was presented.

In Tampa v. Tampa Waterworks Co., 45 Fla. 600, 34 So. 631, the Court said:

> "The Section in question does not operate to prevent the legislature from making contracts itself, nor from authorizing municipalities to make them, and in and by such contracts stipulating for certain rates, which will be valid and binding obligations so long as the legislature does not exercise or authorize municipalities to exercise the power to prevent excessive charges, which is declared by the section to be vested in the legislature. - - - The effect of this section is to reserve to the legislature full power at all times, notwithstanding any supposed contract not to exercise it, to require water companies and others mentioned in the section to comply with their common law obligation to supply their customers at a reasonable rate."

In State ex rel. Ellis v. Tampa Waterworks Co., 56 Fla. 858, 47 So. 358, the Court said:

> "The provision contained in the contract as to rates to be charged for the water is not void under the law, but it is subject to and is controlled by the right to the legislature to provide for regulating the rates under the provisions of Section 30, Article 16, of the Constitution."

In Miami Gas Company v. Highleyman, 77 Fla. 523, 81 So. 775, where the Court had under consideration a franchise contract between the City and Miami Gas Company (the legislature not having delegated the power to regulate gas rates), the Court said:

> "The bill of complaint and answer show a breach of the franchise contract by the defendant gas company. It is manifest that the contract contemplated the furnishing of meter service as a part of the undertaking to furnish gas to the consumers,

and that the contract charge for gas covered the meter service, the privilege of rendering the service being a franchise carrying exclusive rights. If the changed condition caused the contract to work a hardship on the defendant, the Courts may not, for that reason, decline to enforce the rights of the parties under the contract voluntarily entered into by the defendant. See Columbus Ry. etc. v. City of Columbus, 249 U. S....., 39 Sup. Ct. 349, 63 L. Ed....."

In State ex rel. Triay v. Burr, 79 Fla. 290, 84 So. 61, the Court said:

"As to the rights of the City and of the public, in contract rates, where the state has not interposed its authority, see Columbus Railway, Power & Light Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669; Miami Gas Company v. Highleyman, 81 So. 775; City of Manitowoc v. Manitowoc & N. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056.... In the exercise of the power expressly recognized in Section 30, Article 16 of the Constitution, to pass laws upon the subject, the legislature enacted statutes as shown by the titles." (Acts providing for the regulation of street and other railroads.)

In Town of Brooksville v. Florida Telephone Company, 81 Fla. 436, 88 So. 307, a suit to enjoin the telephone company from charging more than the franchise rate, where such increase had been authorized by the Railroad Commission, the Court said:

"By Chapter 6525 power is given to the Railroad Commission to regulate rates, tolls, contracts and charges of telephone companies doing business in the State. That the business of the defendant is so affected by public interest as to permit its reasonable regulation by public authority is not dis-

> puted. This Court has held that rates or tolls to be charged by a public service corporation for services rendered, fixed by a municipality by ordinance as an incident to the granting of a franchise to it by such municipality are subject to legislative control."

This Court, in adopting the construction of this section by the Supreme Court of Florida, in Tampa Waterworks Company v. Tampa, 199 U. S. 341, 26 Sup. Ct. Rep. 23, where the Florida legislature had provided for the regulation of water rates, it said:

> "A natural method of preventing excessive charges is the passage by the city or town within which the services are performed of ordinances establishing reasonable rates and punishing noncompliance. Therefore the power to prevent excessive charges, given to the legislature, properly was exercised by a law granting cities authority to pass ordinances of the kind supposed."

When the legislature does exercise the power vested in it by Section 30 of Article 16 of the Florida Constitution and by laws provide for the regulation of rates covered by a particular contract, then the power and the duty to regulate such rates are reciprocal.

And, while it is true that the power to regulate such rates can not be bartered away or defeated by contract, the distinct holding of the Florida decisions has been that contracts fixing rates to be charged by public utility companies are made with the expectant possibility that the legislature will pass laws providing for the regulation of the rates covered by the contract; but until the legislature does pass such laws and thereby provide for the regulation of such rates, the contract is a valid and binding obligation. This construction places

contracts as to the particular public utility, where the legislature has not interposed its authority within the rule laid down in proposition (b) of Southern Iowa Electric Co., v. Chariton, Supra.

City of Opelika v. Opelika Sewer Co., 265 U. S. 215.

St. Cloud Public Service Co. v. City of St. Cloud, 265 U. S. 352.

The Supreme Court of the State of Florida has decided in this case that the franchise ordinance and the acceptance thereof form a valid contract between the petitioner and the respondent, and the Court will follow the decision of the Supreme Court in this respect.

City of Opelika v. Opelika Sewer & Water Co., 265 U. S. 215.

Maguire v. Reardon, 225 U. S. 271.
Elmendorf v. Taylor, 10 Wheat. 152.
Old Colony Trust Co. v. Omaha, 230 U. S. 100.
Hunter v. Pittsburg, 207 U. S. 161.

It is respectfully submitted that, in order to reverse this case, it would be necessary for the Court to construe the Constitution of the State of Florida adverse to the construction placed upon it by the highest tribunal of the State.

J. J. Cannon

.....

Counsel for Respondent.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

---

## No. 339.

---

SOUTHERN UTILITIES COMPANY, PETITIONER,

*against*

CITY OF PALATKA (FLORIDA).

---

## REPLY BRIEF FOR PETITIONER.

---

W. B. CRAWFORD,
J. T. G. CRAWFORD,
*Solicitors for the Petitioner.*

WILLIAM L. RANSOM,
*Of Counsel.*

APRIL 25, 1925.

IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1924.**

---

## No. 339.

---

SOUTHERN UTILITIES COMPANY, PETITIONER,

*against*

CITY OF PALATKA (FLORIDA).

---

## REPLY BRIEF FOR PETITIONER.

---

The respondent's brief cites familiar decisions and amplifies well-known principles of law, but seems to us to fail to demonstrate their applicability to the particular state of facts here presented, under the Constitution and laws of the State of Florida, as interpreted by the Supreme Court of that State.

---

This cause is here on writ of certiorari to the Supreme Court of the State of Florida. The opinion of the State Court is reported in 99 Southern Reports, at page 326. The petition for certiorari was granted by this Court, upon the application of the Southern Utilities Company, on April 21, 1924. In the State Court, the municipality was the plaintiff. The judgment of the State Court, refusing to inquire into the reasonableness of the electric rate which the company was charging and compelling the company to return to a rate alleged to be confiscatory, was entered upon the overruling of a plea of the defendant company as insufficient (Record, page 20). The facts set out in that plea (Record, pages 24 and 25) are therefore to be deemed true, for the purposes of this review.

No case is cited in which this Court, or any other Federal Court, has upheld a non-compensatory rate under circumstances which seem to us to correspond to those here under review. Upon the facts here presented, the question seems at least an open one in this Court—uncontrolled by any decision cited by the respondent—although it does seem to us to fall exactly within the illustration and the rule declared by Chief Justice White in the *San Antonio* case (255 U. S. at page 556).

**The Decision of the Federal Court as to the Power of the City of Palatka to Contract as to Rates.**

The respondent's brief fails to mention that, as between this municipality and this petitioning public utility, in respect of the rates charged for gas in Palatka, the United States District Court for the Southern District of Florida decided that this company was and is in nowise bound by the rate provisions of this company's *gas* franchise, because the Constitution and laws of the State of Florida do not permit elements of mutuality and enforceability to attach, for any definite period, to *rate* provisions in a franchise "contract" granted by the City of Palatka.

The rate contained in this company's gas franchise having become grossly inadequate, in 1921, the company promulgated and put in force a higher rate. It asked a preliminary injunction to restrain the municipality from trying to enforce the confiscatory rate.

This injunction was granted *pendente lite*, on the ground that the company was not bound or limited by alleged contractual terms which did not, and could not under the Florida Constitution, bind and limit equally the legislative

agency. The company was accordingly permitted to put and keep in effect the higher rate which it had announced.

That ruling of the United States District Court, adverse to the power of the City of Palatka to insert in its franchises any binding provisions limiting rates, was filed in 1921 (*Southern Utilities Co. v. City of Palatka*, not reported; see copy of opinion of Call, D. J., annexed to petition for certiorari in this case), and that higher rate for *gas* has ever since been charged and collected in Palatka, under that decision of the United States District Court.

The State Court having taken a contrary view, upon identic facts, as to franchise provisions fixing future *electric* rates in Palatka, the question is here for decision; and the future of *both* gas and electric rates and service in Palatka will depend upon the outcome here, although the municipality has not brought the Federal determination here for direct review.

## The Facts Which Distinguish this Case from Those Relied on by the Respondent.

Because the question here is, in first instance, whether the facts of this case bring it within the authority of the cases cited by the respondent and by the State Court, we wish to outline very definitely the several facts which seem to us to make this a case of first impression in this Court. For completeness, we will refer, first, to certain of the basic and procedural aspects.

### 1. The Plea Overruled as Insufficient.

The determination and judgment of the State Court, denying to the Southern Utilities Company the right to charge

the rate it had promulgated and compelling it to return to the pre-war rate, was not based upon any hearing of testimony or inquiry as to the *facts* concerning the issue, tendered by the plea, that the ten-cent rate had become unreasonable and confiscatory and that the thirteen-cent rate, established by the company, was required for adequacy. To the city's complaint that the company should be compelled to return to the 1914 rate, the company filed a plea, under the Florida State practice, and that plea alleged various facts (Record, pages 24 and 25). The municipality thought these facts insufficient to bar its claim for the compulsory restoration of the pre-war rate and brought the case on for final hearing *on the plea* (Record, page 26).

After argument, the State Court overruled the plea as insufficient and entered final judgment on that ground (Record, page 26). The facts alleged in that plea are therefore to be taken as true for the purpose of here determining whether the State Court infringed the constitutional rights of this company, as was duly set out in such plea (Record, page 25).

**Substance of the Company's Plea.**

The plea set out, in substance, the following facts, among others:

(1) That the rate of ten cents per kilowatt for electric service in Palatka is unreasonably low;

(2) That although the ten-cent rate was reasonable in 1914, "the great change in economic conditions brought about by the World War have rendered it impossible" and confiscatory, contrary to the provisions of the Constitution of the United States (Record, page 25);

(3) That any rate of less than thirteen cents would deny the company a return on its property, and would be "unreasonably low" and confiscatory of its property, whereas a rate of thirteen cents would be a reasonable rate; and

(4) As a legal conclusion, that the said franchise ordinance, in so far as it purports to prescribe said rate of ten cents per kilowatt, meter measurement, is in conflict with Section 30 of Article XVI of the Constitution of the State of Florida *and is void and of no effect*" (Record, page 25).

The State Court overruled this plea "as insufficient," and by injunction compelled the company to stop charging thirteen cents and to go back to the pre-war rate of ten cents (Record, pages 26 and 27).

That in view of the failure of the franchise to bind *both* parties to the contract—the public and the company—the Court should have proceeded to inquire as to the reasonableness of the thirteen-cent rate promulgated and charged by the company, see the decision of the Circuit Court of Appeals for the Eighth Circuit, in *Nebraska Gas and Electric Company* v. *City of Stromsburg*, decided November 21, 1924, not yet officially reported (26 Rate Research 103).

2. Circumstances of the Establishment of the Rate Enjoined by the State Court.

In this connection, it should perhaps be mentioned that when operating costs began to advance, soon after the outbreak of the World War, the company and the city made some kind of a temporary arrangement or agreement (of which no copy is in this record), whereby the right of the company to charge thirteen cents instead of ten cents was

recognized by the city down to January 1, 1922 (Record, page 17). When this expiration date arrived, the city demanded that electric rates be restored to the pre-war level.

The company was, however, confronted by the fact that its outlays for wages and materials had not returned to anything like pre-war levels. The United States District Court for the Southern District of Florida had held, the year before, in a suit brought by this company, that rate limitations contained in a gas franchise granted by the City of Palatka were not binding upon either the governmental agency or the company, and so did not prevent this company from promulgating and charging higher rates, if required for reasonableness and adequacy.

This ruling seemed equally applicable to the petitioner's electric rates; and so the company continued to charge the thirteen-cent rate, which it had promulgated and charged for several years, with the formal consent of the City of Palatka. This was continued until the State Court restrained it, in July of 1922 (Record, page 11).

### 3. No Empowering of a State Commission to Grant Relief from this Confiscatory Rate.

Unlike nearly all of the States, Florida has not created a commission with power to fix just and reasonable electric (or gas) rates—neither too high nor too low—notwithstanding any limitations undertaken to be prescribed by municipal ordinances. No machinery has been set up for the filing and publishing electric (or gas) rates.

In Florida, electric rates remain subject to common-law requirements of reasonableness and adequacy. The electric company may in first instance promulgate and put in force

such rates as it deems reasonable. The Legislature may at any time act to prevent excessive charges, and may act directly or through a municipality or commission. In the absence of such legislative action, determination of the reasonableness of rates promulgated by an electric company rests, as at common law, in the courts.

Leaving out of consideration for the moment the question whether Florida municipalities may regulate such rates or limit them by franchise, the right to initiate, fix, charge and collect reasonable and adequate electric rates is, of course, vested in the utility itself, subject to the powers of the courts to restrain, or to refuse collection, of excessive or discriminatory rates.

When the City of Palatka refused to permit this company to continue charging the thirteen-cent rate which the new price levels had compelled, there was no State forum to which the company could repair, secure a hearing, present *its facts, and* compel regulatory relief.

If, as the Federal Court had held, rate limitations in Palatka franchises lacked mutuality and bound no one, the course open to the company was to exercise its common-law right to fix and collect such rates as it deemed necessary for adequacy, subject to judicial review if the company exercised capriciously this common-law right of rate determination and promulgation; and *this was exactly what the company did* and was exactly what the State Court restrained it from doing, the ground of such restraining being that the franchise provision forbade and stood in the way, and would continue to forbid and stand in the way, of compensatory rates, unless and until the Legislature itself, or some regulatory agency created and empowered by it, should determine

that this company need not continue to charge rates so low as to confiscate its property.

4. The Franchise and Its Rate Provisions.

The franchise ordinance and the company's acceptance thereof are printed in full at pages 5 to 10, inclusive, of the records (Exhibits "A" and "B" to complaint). The plea overruled by the State Court referred to this ordinance and alleged the copy thereof to be true and correct (Record, page 24).

The rate provisions of this 1914 ordinance are not recited as conditions of, or as consideration for, the grant. Other provisions, which were intended to be made conditions of the grant, are so described (Section 121; Record, page 7).

*The term of the grant was thirty years* (Section 1; Record, page 5). The franchise grant [illegible] was not exclusive (Section 17; Record, page 8). Section 14 of the ordinance gives the city a remedy by forfeiture for "a substantial failure on the part of the grantees herein to comply with the terms and provisions of this ordinance."

5. Provisions and State Interpretation of the Florida Statutes as to Municipal Control Over Electric Rates.

No provision of the Palatka charter or of any statute of the State of Florida contains any specific provision or reference indicative of an intent to empower the City of Palatka to insert in its franchise ordinances or contracts any limitation on the rates chargeable by the company to its general patrons (other than the municipality), for a thirty-year period or any specific period.

The Supreme Court of Florida has, however, held that, in the absence of any specific constitutional or statutory provision to the contrary, the power to insert rate limitations in a franchise ordinance is a part of the inherent and implied governmental power of the municipality, in the interest of its inhabitants, and that power to include rate schedules in municipal ordinances is to be deemed inferable from the *general* grants of power made by the Legislature to the City of Palatka.

In this Court, the foregoing is of course to be accepted as a pertinent part of the interpretation which the highest Court of the State has placed upon its Constitution and laws.

As to the *nature* of such derived power of the municipality to insert rate provisions in franchise ordinances, we cannot assert that the opinion of the Florida Supreme Court is clear beyond peradventure. It would seem, however, that significance must fairly be attached to the following excerpts from the opinion under review (Record, pages 41 and 42).

> "Erecting or establishing or procuring and operating a public utility plant may be a corporate or business function, while *contracting,* in connection with a franchise grant to a public service corporation, for service of a public nature to its inhabitants, may be *a governmental power of a municipality*" (Record, page 42).
>
> "Ordinance contracts for supplying the city and its inhabitants with lights, is a usual and necessary function of a municipality, and authority to make such contracts may be included in powers given in general terms, where such power is not in conflict with specific powers conferred. See *State ex rel. Ellis vs. Tampa Water Works,* 56 Fla. 858; 47 Southern Rep. 358" (Record, page 41).

> *"The above-quoted general statutory powers of the city are sufficient to confer upon the city authority to make a franchise contract with provisions as to rates to be charged individuals for electric lights of the character of the one in controversy;* such contract is consistent with the express power 'to provide for the lighting of streets of the city,' and is not repugnant to or inconsistent with any specific or general statutory power of the city" (Record, pages 41-42).
>
> "Authority to make the contract for rates in this case is afforded by the general provisions conferred upon the city. Such authority is not inconsistent with special powers given the city, and is not in derogation of any State law or rule of public policy in this State" (Record, page 42).

### 6. The Florida Constitution and the State Interpretation of Its Pertinent Reservation.

We come now to the aspects which seem to us to distinguish this case from all of those relied on by the Florida Supreme Court and cited by the respondent, and to align this case rather with the rulings in the Iowa, Texas, Louisiana, Colorado and Nebraska cases, if, indeed, the legal principles determinative of the instant state of facts have anywhere been specifically applied to them.

The Florida Constitution provided, at the time the 1914 ordinance was passed by the Palatka City Council, and still provides (Section 30, Article XVI; Record, page 35):

> "The Legislature is invested with full power to pass laws for the correction of abuses and *to prevent unjust discrimination and excessive charges* by persons and corporations engaged as common carriers in transporting persons and property, or performing *other*

> *services of a public nature;* and shall provide for enforcing such laws by adequate penalties or forfeitures." (Italics ours.)

The furnishing of electric service falls within the category of "other services of a public nature." The Florida Legislature is therefore to be deemed invested, by Section 30, with full power to "prevent unjust discrimination and *excessive* charges" for electric service.

The effects of this section of the organic law of the State of Florida were construed by the Supreme Court of the State in *City of Tampa vs. Tampa Water Works* (45 Fla. 600; 34 Southern Rep. 631; Record, pages 35 and 36), on the authority of which decision the present case was decided by the Florida Supreme Court.

As to this power to prevent "unjust discrimination and *excessive* charges," the State Court has held, in substance (italics ours):

> "1. That the power mentioned in this section is full power; a continuing, ever-present power. Being irrevocably vested by this section, the Legislature can not divest itself of it. *Neither can it bind itself by contract, nor authorize a municipality—one of its creatures—to bind it by contract, so as to preclude the exercise of this power whenever in its judgment the public exigencies demand its exercise. Full power cannot exist, if by contract that power can be curtailed or impaired.*" (Record, page 36.)
>
> "2. That without this section this power to regulate rates would exist under the general grant of legislative power in Section 1, Article III, but such power could be surrendered by a contract made by the State or by a municipality by its authority. With

this section in force, the power to surrender by contract the right to regulate rates is taken away, for the authority to surrender cannot co-exist with the ever-present, continuing power to regulate, which is declared by this section to exist in the Legislature." (Record, page 36.)

"3. That every charter granted and every contract made by the Legislature, or by a municipality under its authority, are accepted and made subject to and in contemplation of the possibility of the subsequent exercise of the power to prevent *excessive* charges, which by this section is unalterably and irrevocably vested in the Legislature. *The section not only becomes a part of every such contract, as much so as if written therein, but by implication it denies the authority of the Legislature to bind itself either by a contract of its own making, or one made by a municipality under its authorization, not to exercise the power thereby recognized whenever in its wisdom it should think necessary to do so.*" (45 Fla. 600; Record, page 36.)

As construed by the highest Court of Florida, therefore, the provisions of Section 30 of Article XVI, empowering the Legislature, directly or through an authorized agent (*e. g.*, a municipality or commission), *to prevent excessive charges and reduce electric rates*, is as much a part of every franchise contract "as if written therein." This provision for a *reduction* in the franchise rates, at the will of the Legislature or its authorized agent, is held to be an integral part of the franchise at bar.

The highest Court of Florida has held, in this and numerous other cases, that a utility company can *increase* its rates above franchise figures only if it obtains the *consent*

*of* the opposite party to the "contract," *e. g.*, the municipality or the Commission (where the Legislature has delegated rate-revising powers to a commission).

On the other hand, the State Court has held that franchise rates may be *reduced*, over the objection of the utility company, by the "other party" to the contract—the Legislature, acting directly or through the municipality or a commission.

*In the Tampa case just quoted, the State Court interpreted Section 30 to mean not only that a rate fixed in a franchise contract may be* REDUCED *over the objection of the utility company, but that such compulsory reduction of the franchise rates may even be made by the municipality itself, even where the Legislature has subsequently vested the municipality with power to regulate rates.*

*City of Tampa vs. Tampa Water Works, supra.*

When the State Court refused to give the water company an injunction against the municipal reduction below the contract rate, the case was carried by the company to this Court, which adhered to the interpretation which the State Court had placed upon Section 30, Article XVI, of the State Constitution, and so refused to treat the contract rates as enforceable in behalf of the company, no claim being made that the lowered water rates would enforce confiscation.

*Tampa Water Works vs. Tampa*, 199 U. S. 241.

If the State Court holds that, because of the presence of Section 30 as virtually a literal part of every franchise agreement in Florida, the Legislature directly or through an authorized agent (*e. g.*, the municipality) may at any time *reduce, over*

*the company's objection, a rate fixed in a franchise grant, notwithstanding the franchise term, may the franchise rates be insisted upon by the city as limiting and preventing the company from exercising its common-law right to advance its rates, if need be, to escape confiscation and secure adequacy of return?*

If, as we have seen, in the State of Florida, no franchise contract, made by the Legislature or any of its agents, can constitutionally authorize or fix a rate which may not immediately or at any time be reduced through the exercise of this one-sided reservation of right to *reduce* rates at any time the public interest seems to require it, and to do so through the Legislature or any delegated creature of the Legislature, how is the Florida situation to be distinguished, *in legal effect*, from that obtaining in Iowa, Colorado, Nebraska, Texas, Louisiana, and other States where the provisions of the State Constitutions are deemed to deprive franchise contracts of mutuality and enforceability as to rates.

In none of the cases cited by the respondent do we find a decisive answer to these interesting questions of mutuality and fair play. Nowhere is it demonstrated in the respondent's brief that the decisions of this Court in the *San Antonio* case (255 U. S. 547), *the Ortega Company* case (260 U. S. 103), the *Chariton* case (255 U. S. 539), the *St. Cloud* case (265 U. S. 352), and of the Circuit Court of Appeals for the Fifth Circuit, in which Florida is situated (*City of New Orleans vs. O'Keefe*, 280 Fed. 92), and of the Circuit Court of Appeals for Eighth Circuit in *Nebraska Gas and Electric Company vs. City of Stromsberg* (not yet officially reported), are not, *in principle and legal effect*, fully applicable here.

## I.

### The Two Tests Laid Down by this Court in the Chariton Case.

The respondent's brief agrees (page 1) that this case is controlled by the decision of this Court in the *Chariton* case (255 U. S. 539), but proceeds fundamentally on the theory that this case falls within the *second* of the two "indisputable propositions" declared in the *Chariton* case:

> "(*a*) That although governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations;
>
> "(*b*) That where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contracts rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

**Power to fix by contract means power to fix by valid, mutual contracts; the Palatka franchises do not and cannot "fix by contracts rates to govern during a particular time."**

The United States District Court so held, as to the gas franchise, for reasons equally applicable to the thirty-year electric

franchise here at bar. If this ruling was correct, the State Court was wrong in compelling the company to abandon its reasonable and lawful rate and return to a rate which had become confiscatory.

That the State Court held that the City of Palatka had power to put a rate schedule in a franchise which, in behalf of the State, the city granted for a term of thirty years, may be deemed controlling on this Court; but that fact does not make such a document a *contractual fixation of rates to govern for that thirty-year period.*

The State Court has also held that, under the Florida Constitution, the Legislature has not empowered, and cannot empower, any of its creatures to do what the Legislature could not itself do, viz., to make contracts fixing *rates which shall remain in force "for a particular time" unless both the Legislature (or its agent) and the company consent meanwhile to a change in such rates.*

On the contrary, the State Court has held that an integral part of every franchise "contract" in Florida is a provision that such rates may at any time be *reduced,* during the franchise period, over the company's objections.

The State Court has also held that as to any rates inserted in a franchise contract by a municipality, the Legislature may, at any time during the franchise period, *reduce* such franchise rates, over the company's objections, and that such involuntary reduction may be compelled by the Legislature directly or through any of its authorized agents, at the will of either, even by the municipality which put such rates into its franchise grant.

*These* interpretations of the State Constitution and statutes, by the State Court, are also controlling upon this Court; and

if their effect is to destroy mutuality and definiteness of period, as to rate provisions in a franchise, and if such franchise provisions are nevertheless used by the State Court to compel the utility to continue those rates against its will, although they have become confiscatory, whereas the utility could not compel the State to continue them against the will of the Legislature, if such rates had become excessive, *it seems clear to us that there is no fixation by contract of rates to govern for a definite period, within the meaning of the second proposition declared by this Court in the Chariton case.*

**The Chariton Case.**

The respondent's brief (page 1) deems this case controlled by the *Chariton* case (255 U. S. 539). In the *Chariton* case, as here, the State Court had construed the Iowa Constitution and laws to mean that the regulatory power could be asserted to reduce a franchise rate at any time. This had not been done, as to the franchise in question, but the right to regulate and reduce existed and could be asserted and exercised at any time.

These facts were deemed by this Court to prevent Iowa municipalities from making rate contracts enforceable, at the instance of the utility, for any definite period of years. This Court therefore held that such Iowa franchises lacked mutuality, were void, and could not be enforced *against* the utility, to prevent reasonable rates.

**The San Antonio Case.**

On the same day as the decision in the *Chariton* case, a decision was filed also in the *San Antonio* case (255 U. S.

547). Both opinions were written by Chief Justice White; both held rate provisions of franchise grants to lack mutuality and so to be unenforceable against the company.

In the *San Antonio* case, Chief Justice White said, illustratively but most pertinently:

> "Where the right to contract exists, and *the parties, the public on one hand and the private on the other,* do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. *Were, therefore,* as in the case supposed in the argument, *the regulating power of government wholly uncontrolled by contract,* it would follow that that power would have to be exerted *and hence the supposed condition operating on the private owner would be nugatory.*"

That rule and illustration seems precisely in point here. The two parties to a franchise are the public and the private company. Florida Court has held that a franchise contract in that State necessarily leaves "the regulating power wholly uncontrolled." The constitutional prohibition against any abridgment or suspension of the regulatory power is deemed incorporated into every franchise. There cannot be an iota of suspension or limitation of the regulatory power, by any franchise contract. The right and power to reduce is plenary.

Under such circumstances, Chief Justice White said that "the supposed condition on the private owner would be nugatory."

If the supposed rate provision is "*nugatory,*" then the petitioner had the right to increase its rates to avoid confiscation.

**The City of St. Cloud Case.**

The respondent seems to rely chiefly upon the *Opelika Sewer Company* case, from Alabama, decided by this Court in May of last year. The respondent's brief makes no effort to distinguish the decision in the *City of St. Cloud* case, decided by this Court on the same day. Under the Minnesota Constitution and laws, the city of St. Cloud had been given power to fix rates by contract for a fixed term and also the power to regulate rates. Evidently realizing that if *both* these powers were possessed *contemporaneously*, any rate contracts would be void for lack of mutuality, this Court held that these were alternative and mutually exclusive provisions; the city could act by *either* method, but not by both.

If the municipality made a rate contract, it could not, during its term, change the rates without the utility's consent; nor could the Legislature itself make such a change during such period. Even the legislative power was, under the *Los Angeles* case, deemed suspended by the city's authorized contract.

On such a construction of the State laws and the franchise contract, the latter was deemed to have mutuality and validity.

Yet, in Florida, the State Court has held that the city's contract does not and cannot suspend the regulatory power in any respect whatever; that the Legislature may reduce the rate at any time; that the Legislature may even subsequently empower the city to reduce the rate at any time; that the city may reduce the rates, and that the company cannot complain or resist if the city does so reduce the franchise rates within the franchise period.

The difference between the *St. Cloud* decision and the Florida interpretation may be made clearer by noting this fact: In the *St. Cloud* opinion, reference is made to a provision of the Minnesota laws conferring regulatory powers on municipalities. This provision was that such enactment should not affect or impair the validity of any existing contract with a public utility. This was deemed to emphasize that the franchise contract suspended the regulatory power and so possessed mutuality.

In the *Tampa* case (*supra*), in Florida, the Municipal Empowering Act contained an identic provision against impairing existing contracts. Nevertheless the Florida Court held that the city might reduce the franchise rate, over the utility's objections. This was because the provisions of Section 30, as to preventing *excessive* charges, were as if physically incorporated in the franchise contract.

**The Opelika Sewer Case.**

This decision is, perhaps with some reason, relied on by the respondent. The precise questions here presented and litigated do not seem to us to have been raised and decided in that case. Therefore the *Opelika* decision should not be deemed precedent here. In any event, the *Opelika* decision must be read and considered in connection with the contemporaneous *St. Cloud* decision, above reviewed.

In the *Opelika* case, there was considerable uncertainty in this court whether the Alabama statutes really contemplated that the disposition of sewage and the ownership of sewage facilities were to be turned over to a private corporation, by contract. The State Court held this view, however, and this Court adopted it, subject to the proviso of the

State Constitution that the legislature might *"revoke"* such a contract.

The State Court further held that the municipality had been specifically given the power to *regulate* sewer rates. This grant ante-dated the contract in suit.

The Alabama Court held that under its Constitution and laws, that, despite this power of municipal regulation *in the absence of contract, "the city of its own motion may not recede"* from a rate contract, once entered into. The language quoted is that of this Court, in adopting the State view.

In *Bessemer v. Bessemer City Water Works* (152 Ala., 391), cited by this Court (page 219) as the State decision that "a city even though having the power to regulate rates could find itself by contract," it was held that a franchise contract wholly suspended the regulatory power during the franchise term and created "a vested right" in favor of the company. Such a construction of the State law could of course import mutuality to a franchise grant.

That, however, is not the Florida construction of its constitution and laws. The Supreme Court of Florida has held, and this Court has held, that a Florida municipality possessing the regulatory power, even granted *after* the rate contract, may "of its own motion recede" from a rate contract such as that at bar (199 U. S. 241).

**The Recent Decision of the Circuit Court of Appeals for the Eighth Circuit.**

In *Nebraska Gas and Electric Company vs. City of Stromsburg*, decided on November 21, 1924, and not yet officially reported (26 Rate Research 103), the franchise was for a twenty-year period and the company had been permitted to

exceed the franchise rates during 1920 and 1921. The city brought suit to compel the company to return to the franchise rates. The company interposed a plea similar to that here at bar.

The Circuit Court of Appeals for the Eighth Circuit, six months after the decision in the *Opelika* and *St. Cloud* cases, held that the rate provisions of the franchise contract lacked mutuality and were void and unenforceable, and remanded the case to the trial court to hear and determine the question of what rates were in fact required, to avoid confiscation.

This decision as to lack of mutuality was based on the provision of the franchise ordinance, which undertook to give the city a right to have the rate *revised downward*, at the end of the second, fifth, tenth and fifteenth years, but gave no corresponding right to the company.

We refer to the careful opinion of the Circuit Court of Appeals. On its facts, the *Stromsburg* case is closely similar to the present case, except that here the provision read into the franchise authorizes a preventing of *excessive* charges at *any* time.

**The Saratoga Springs Case, in New York.**

As further bearing upon the validity of a reservation of right to *reduce* rates, with no right to increase them for cause, we may refer to the fact that in *Village of Saratoga Springs vs. Saratoga Gas and Electric Co.* (191 N. Y. 123), the New York Court of Appeals had before it the rate-fixing provisions of the Public Service Commission's law as first enacted, in 1907. That statute empowered the Commission to fix rates for a period prescribed in the order, not exceeding three years.

If the company accepted such rates and put them into force, the company was bound by them for such period and thereafter until the Commission changed them; *the company* could not increase them or file complaint with the Commission to increase them. On the other hand, the Commission might reduce such rates if the facts were found to warrant it.

The Court of Appeals held that such a provision lacked mutuality; that it purported to bind the company to continue specified rates but not the State, and that the provision accordingly denied to the company the equal protection of the laws and rendered invalid any rate fixation pursuant to it.

**Respondent's Own Brief Negatives the Idea of Mutuality of Obligation and Definiteness of Period.**

The respondent's position is frankly that these franchise rates are contractually binding upon the company for thirty years, but are contractually binding upon the Legislature and city only until the Legislature changes them or authorizes some one else to change and reduce them, in which event the contract obligation automatically ceases.

"The respondent's contention, and the decision of the Supreme Court of Florida in this case," is that rates contained in a franchise are "valid and binding contractual obligations" (as against the company) "*so long as* the Legislature does not exercise its power" under Section 30 of Article XVI of the State Constitution (Respondent's Brief, page 2). This the Legislature may do at any time, whereupon the franchise rates admittedly cease to be "valid and binding contractual obligations."

"*Until* the Legislature does pass such laws * * * the contract is a valid and binding obligation" (Respondent's Brief, page 7).

In other words, the respondent's position is that franchise rates continue only at the will of one of the parties; the State or its creature can prevent the company from increasing them, but the company could not prevent the Legislature or its authorized creature from reducing them.

**That the Legislature has not yet abrogated the rates in this franchise does not give mutuality and definiteness of period to these franchise rates.**

One of the fundamental misapprehensions indulged in by the respondent's counsel and by the State Court is that a purported contract possesses mutual enforceability up to the moment that the party now seeking to enforce it tries instead to repudiate and change it.

Mutuality and definiteness of period do not, we submit, arise in any such way. These franchise rates do not derive definiteness of period or mutual enforceability from the fact that the party which would be interested in *reducing* these rates has *not yet* tried to do so itself and has *not yet* authorized any of its agents to undertake such a disregard of the franchise rate. The lack of mutuality arises, as held in the *Chariton* and *Stromsburg* cases, from the fact that such a one-sided provision for change in the contract rates, is contained or read into the contract itself.

The *test* is whether one of the two parties *could, at will,* undertake such a flouting of the franchise rates, *within the contract period,* against the remonstrance and to the ruin of the opposite party. The State Court has held, and this Court has held, that one of the two parties to these Florida franchises could reduce these rates, at any time, regardless of the other party's objections.

*Tampa Water Works vs. Tampa, supra.*

As pointed out by Chief Justice White in the *San Antonio* case, already quoted, every "contract" in respect of public utility rates has two parties: (1) The *public,* acting through the Legislature or through an authorized agency (*e. g.,* a municipality), and (2) the public utility company.

The Legislature and the municipality *are not two different and separate parties.* They are one and the same party—principal and agent. In a controversy with the opposite party, the Legislature and its creatures have no rights *inter se.*

If the contract lacks mutuality and definiteness of period as against the principal, it lacks those same qualities as against the agent and is not enforceable by the agent.

If the city has, or may be given by its principal, power to reduce rates inserted in franchises, and to do this within the franchise term, and over the company's remonstrance, the fact that the agent has not yet done this or has not yet been delegated by its principal to do this, remains immaterial.

If the agent or the principal may reduce franchise rates at any time without the company's consent, the company may increase its rates to the point of reasonableness and adequacy without the agent's consent or the principal's consent.

If the rate provisions are not binding on the Legislature (the principal), they are not really binding on the city (the agent), and so are not really binding upon the opposite party (the company).

The foregoing seem to us axiomatic and elementary principles of contract law, which we should not set forth here if it were not that the respondent's whole brief proceeds in failure to disregard these clear distinctions.

**Respondent's Cases do Not Apply to the Facts of this Case.**

Respondent's brief does not cite any Federal decision in which mutuality and enforceability has been held to attach to the rate provisions of a franchise grant where, as here:

(1) The State Court has held that the franchise provisions do not and cannot suspend or restrict the exercise of the regulatory power against the company's rates; or where

(2) The State Court has held that the franchise, actually or by implication, contains a provision that the franchise rates may be *reduced* during the franchise term, without the company's consent, but contains no corresponding provision or procedure for *increase*, if such increase becomes imperative.

As was said by Chief Justice White in the *San Antonio* case, if "the regulating power remains wholly uncontrolled," the supposed restriction on the utility company *"becomes nugatory."*

**Classes of Cases Deemed Irrelevant Here.**

Three classes of cases are wholly irrelevant to this issue:

(1) Cases such as *Detroit vs. Detroit Citizens St. Ry. Co.* (184 U. S. 368), where the State Court has construed the rate contracts made by the State agency (*e. g.*, the municipality) to be beyond the power of the Legislature, directly or through the same or any other agency (*e. g.*, a commission) to change during the contract term; and

(2) Cases in which one of the parties to a rate contract (*e. g.*, the utility) seeks the consent of the opposite party

(*e. g.*, the Legislature or *one* of its agents, the Commission) to a change in the rate, and the question arises whether such a change can be made over the objection of *another* agent of the Legislature (*e. g.*, the municipality who acted for the State in making the contract in first instance);

(3) Cases in which a public utility company has made a rate contract with third parties (*e. g.*, large consumers), and the State undertakes, under the police power, to regulate and change such contract rates.

Perhaps this whole matter can be clarified by the answer to this question: Under Section 30, could the Florida Legislature itself make a valid contract so as to fix rates for a definite term, say of thirty years? Clearly it could not make a contract fixing rates in any way which precluded its reduction of them, if it saw fit, the following day.

If the Florida Legislature itself cannot by contract fix rates for a definite term, how can a creature of the Legislature do what its principal is forbidden to do?

## II.

**Rights of the utility company if the contract rates are to be deemed plenarily subject to regulation.**

If, however, an implied term of this franchise is that the specified rates are to remain subject to change upward or downward, in the manner permitted by such regulatory procedure as the State has set up, then in Florida it was the right of this Company to fix and promulgate such rates as it deemed necessary, subject to review of their reasonableness by the courts or by any agency which the State may thereupon set up for the purpose.

The Florida Supreme Court also held that the reserved power to regulate rates "merely makes all contract rates subject to regulation notwithstanding the contract" (Opinion on Rehearing; Record, page 45).

The Court, in its principal opinion, said that the Legislature had not "authorized the city *or any other governing body* to regulate such rates" (Record, page 42). But, if the ordinance rates are subject to regulation, and the power of regulation has not been vested specifically in the municipality or governing body, but is vested, as at common law, in the company itself, then the company has the right to fix rates different from those specified in the ordinance and an injunction by the State Supreme Court compelling it to observe the ordinance rate and restraining it from enforcing the rate prescribed by the company under the power of regulation vested in the company is confiscatory and violates the Constitution of the United States. The decree of the State Court itself becomes thereby violative of the constitutional guaranties against confiscation and for equal protection of the laws.

**The South Glens Falls Case.**

One of the cases largely relied on by the Florida Court, especially in its opinion on rehearing (Record, pages 37 and 46), is the *South Glens Falls* case (225 N. Y. 216; 121 N. E. Rep. 777). In that case a rate limited by a village franchise contract had admittedly become inadequate. The gas company promulgated and put in effect a higher rate. The village complained to the Commission that the franchise rate should be restored and enforced because of the contract.

In several cases since that time, the New York Court of

Appeals has upheld the right and power of a utility company to advance its rates to a figure in excess of franchise limitations, and to do this merely by promulgating such rate, without any determination or affirmative action by the Commission or any Court.

*Town of North Hempstead vs. P. S. Corporation of Long Island,* 231 N. Y. 447;

*Public Service Commission vs. Pavilian Natural Gas Co.,* 232 N. Y. 146.

It seems to us clear that the respondent is confronted with this dilemma:

*Either* the Palatka franchise is void for want of mutuality,

*Or* that if a *mutual* right of change in the franchise rate is conferred by the contract, the company is entitled to proceed in the manner in which it did, and the State Court should have proceeded to inquire into the *merits* of the company's plea, as held in the *City of Stromsburg* case, *supra.*

## III.

**Rights of the company if, as the Florida Supreme Court indicated, these franchise rates were fixed in the exercise of governmental powers.**

If the 1914 franchise "left the regulating power uncontrolled" and so lacked mutuality and definiteness of period, then its rate provisions could lawfully have been disregarded and exceeded by the utility in the manner adopted.

The same conclusion also follows if these rate provisions are to be deemed inserted in this 1914 contract in pursuance of governmental powers. We have already quoted

some of the phrases of the State Court, pertinent to this phase of the case, especially the statement (Record, page 42) that

> "Erecting or establishing or procuring and operating a public utility plant may be a corporate or business function, while *contracting,* in connection with a franchise grant to a public service corporation, for service of a public nature to its inhabitants, may *be a government power of a municipality.*"

If a contract is made in a governmental capacity, then it partakes of the nature of a regulation; and, if so, it would fall within the proposition stated by this Court in *Southern Iowa Electric Co. vs. Chariton,* (255 U. S. 539), that the power exercised "does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations."

## IV.

## In Conclusion.

With all deference to the State of Florida, we submit that every intendment should here be in favor of reversing the action of the State Court and thereby enabling this company to end confiscation and restore a reasonable rate.

If this is not done now by this Court, this company will be left without remedy for confiscation and ruin, because the State of Florida has refrained from erecting any tribunal for the redress of grievances as to electric rates. So backward and remiss a legislative policy should not be encouraged by making it an effective bulwark, from behind which private property may be confiscated without remedy and without penalty.

The policy of the law should encourage just and reasonable rates—neither too high nor too low. Premium should not be put upon the withholding of just treatment by the erection of modern regulatory tribunals.

The continuing reasonableness of rates and their adaptation to changes in the purchasing power of money should be the objective of the law, so far as consonant with the orderly development of the relation of the legislative and judicial power as to private property devoted to public service.

The law should regard the substance and the actuality of the thing done. It is clear that the actual results of the Florida legislation and the State rulings thereon are injustice, confiscation, and oppression.

WILLIAM L. RANSOM,
*Of Counsel for the Petitioner*
*Southern Utilities Company.*

No. 339

# In the Supreme Court of the United States

**October Term 1923**

SOUTHERN UTILITIES COMPANY,
Petitioner,
vs.
CITY OF PALATKA, FLORIDA,
Respondent.

## BRIEF OF RESPONDENT

J. J. CANON,
P. H. ODOM,
Counsel for Respondent.

# In the Supreme Court of the United States

**October Term 1923**

Southern Utilities Company, a corporation, Petitioner,
vs.
City of Palatka, a municipal corporation, Respondent.

## BRIEF OF RESPONDENT

The Respondent, the City of Palatka, a municipal corporation existing under the laws of the State of Florida, makes the following statement in reply to the petition:

1. That paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the Petition for Writ of Certiorari to the Supreme Court of the State of Florida contains a substantial statement of the status and contentions of the case.

2. The Respondent's proposition is that the franchise granted by it became, when accepted by the petitioner, and continues a binding contractual obligation, of which contract the rate provision therein contained is an integral part.

3. None of the provisions of the franchise contract are against public policy or repugnant to the constitution of the United States.

4. The courts of the several states and this court have universally held contracts of this character legal and binding, unless prohibited by statute or the constitution of the State.

5. The decision of the Supreme Court of Florida is in effect a recognition that the Legislature by implication sanctions contracts between cities and public utility companies supplying it with electricity by exercising its constitutional powers of regulation as to other public utilities, and not exercising its constitutional powers of regulation as to electric lighting.

6. The decisions of the Supreme Court of Florida contained in paragraph eight of the petition for Writ of Certiorari are based upon circumstances subsequent to the delegation of the power to regulate rates as to the particular public utility in the respective cases considered, affirmatively recognizing the power of a municipality of this State to contract with public utility companies supplying it with electricity, where the power to regulate rates of such utility has not been delegated by the Legislature, and are in complete accord with the decision of the Supreme Court of Florida in this case, and Miami Gas Company v. Highleyman, 77 Fla. 573, 81 So. 775.

7. The Supreme Court of the State of Florida, in Triay v. Burr, 79 Fla. 290, 84 So. 61, Tampa v. Tampa Waterworks Company, 45 Fla. 600, 34 So. 631, Brooksville v. Brooksville Telephone Company, 81 Fla. 463, 88 So. 307, State ex rel. Ellis v. Tampa Waterworks Company, 56 Fla. 858, 47 So. 358 and Miami

Gas Company v. Highleyman, 77 Fla. 523, 81 So. 775, has completely construed and fixed the meaning and scope of Section 30 of Article 16 of the Constitution of the State of Florida. This construction and the affirmation thereof by this Court in Tampa Waterworks Company v. Tampa, 199 U. S. 341, 26 Sup. Ct. Rep. 23, has so explicitly foreclosed all federal question as to afford no basis for Writ of Certiorari.

8. The petitioner's sole proposition in the Supreme Court of Florida was that the franchise contract was not binding under Section 30 of Article 16 of the Florida Constitution, and, therefore, the enforcement of such contract violated the fourteenth amendment to the Constitution of the United States. The Supreme Court of Florida, again construing this section of the Constitution of the State, held that the franchise contract did not violate any provision of the State Constitution, and was a legal and binding obligation under the Constitution and Laws of the State of Florida. It appears from the record that the case presents no federal question for determination by this court, and the decision herein affirmatively shows that the Florida Supreme Court rested its decision on independent grounds not involving a federal question and broad enough to maintain its decision, independent of any federal question that might have been urged.

9. The Writ of Certiorari from this Court to the Supreme Court of Florida in this case would involve the construction of the constitution of the State of Florida adverse to the construction placed upon it by the highest tribunal of the State.

## ARGUMENT

In support of the foregoing reply, we would quote from the opinion of this Court in the case of Southern Iowa Electric Company v. Chariton, 255 U. S. 439:

> "Two propositions are indisputable:
>
> "(a) That although governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the properties of such corporations;
>
> "(b) That where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contracts rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

The petiontioner's contention is that the contract here in question falls within the first proposition advanced in the above quotation upon the theory that Section 30 of Article 16 of the Florida Constitution prohibits contracts between the State of Florida, or any agency thereof, and any person or corporation furnishing a public utility fixing the rate or charge for such service.

The provision in question is in the words following:

> "The legislature is vested with full power to pass laws for the correction of abuses and to pre-

> vent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transportating persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

While the respondent's contention, and the decision of the Supreme Court of Florida in this case, is that contracts made by a municipality and a public Utility Company fixing service rates for the furnishing of electricity are valid and binding contractual obligations so long as the legislature does not exercise its "full power to pass laws" for the regulation of the same.

In Southern Iowa Electric Co. v. Chariton, quoted above, the Court had under consideration Section 725 of the Iowa Code, relating to the powers of municipalities:

> "Sec. 725. Regulation of Rates and Service. They shall have power * * * to regulate and fix the rent or rates for water, gas, heat and electric light or power * * * and these powers shall not be abridged by ordinance, resolution or contract."

The distinct holding in the case was that contracts as to rates for the public service enumerated in this section of the Iowa Code were expressly prohibited, and came within the first proposition quoted. The Supreme Court of Iowa, however, in the case of Ottumwa Ry. & Light Co. v. Ottumwa, 173 Northwestern Reporter 270, wherein the Court had under consideration a contract fixing the fare charged by a street railway, held that such contract did not come within the section of the Code and was a valid and

binding contract, coming within the second proposition quoted. In the last cited case the Court used the expression:

> "Code 1897, 725, prohibiting abridgement by contract of the power to fix and regulate the rents or rates of water, gas, heat and electric light or power, authorizes the city to make contract unalterably fixing the rate of fare to be charged by street railroad for a certain period not manifestly too long, since such statute enumerating changes as to which such contract can not be made, SANCTIONS CONTRACT AS TO STREET CAR FARES NOT THEREIN ENUMERATED."

The legislature of the State of Florida has construed Section 30 of Article 16 of the Florida Constitution that there is VESTED in the legislature the power to regulate rates to be charged by "persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature," properly and only exercised by the LEGISLATURE acting under its constitutional power to "PASS LAWS for the correction of abuses and to prevent unjust discrimination and excessive charges."

This construction has been demonstrated by the legislature passing laws for the regulation of the rates of Street railroads, water companies, and telephone and telegraph companies. See cases cited in paragraph 7 of Reply.

It cannot be contended that the furnishing of electric lighting was not a public utility at the time the legislature passed the laws for the regulation of the charges of the utilities mentioned in the preced-

ing paragraph. It would seem, therefore, that the legislature of Florida SANCTIONS CONTRACTS AS TO THE FUR ISHING OF ELECTRIC LIGHTING NOT THEREIN ENUMERATED, as the Iowa Legislature sanctions contracts not enumerated in the Section 725 of the Iowa Code.

The Supreme Court of Florida has so construed the Section of the Florida Constitution (Section 30 of Article 16) in all of the rate cases where this question was presented:

In Tampa v. Tampa Waterworks Co., 45 Fla. 600, 34 So. 631, the Court said:

> "The section in question does not operate to prevent the Legislature from making contracts itself, nor from authorizing municipalities to make them, and in and by such contracts stipulating for certain rates, which will be valid and binding obligations so long as the LEGISLATURE DOES NOT EXERCISE OR AUTHORIZE MUNICIPALITIES TO EXERCISE THE POWER TO PREVENT EXCESSIVE CHARGES, which is declared by the section to be VESTED IN THE LEGISLATURE * * * The effect of this section is to reserve to the legislature full power at all times, notwithstanding any supposed contract not to exercise it, to require water companies and others mentioned in the section to comply with their common law obligation to supply their customers at a reasonable rate."

In State ex rel. Ellis v. Tampa Waterworks Co., 56 Fla. 858, 47 So. 358, the Court said:

> "The provision contained in the contract as to rates to be charged for the water is not void under the law, but it is subject to and is controlled by the RIGHT TO THE LEGISLATURE TO

PROVIDE FOR REGULATING THE RATES under the provisions of Section 30, Art. 16, of the Constitution."

In Miami Gas Co. v. Highleyman, (la.) 81 So. 775, where the Court had under consideration a franchise contract between the City and Miami Gas Company (the legislature not having delegated the power to regulate gas rates), the Court said:

> "The bill of complaint and answer show a breach of the franchise contract by the defendant gas company. It is manifest that the contract contemplated the furnishing of meter service as a part of the undertaking to furnish gas to consumers, and that the contract charge for gas covered the meter service, the privilege of rendering the service being a franchise carrying exclusive rights. If the changed conditions caused the contract to work a hardship on the defendant, the Courts may not, for that reason, decline to enforce the rights of the parties under the contract voluntarily entered into by the defendant. See Columbus Ry. etc. v. City of Columbus, 249 U. S.——, 39 Sup. Ct. 349, 63 L. ed. ——."

In State ex rel. Triay v. Burr, 79 Fla. 290, 84 So. 61, the Court said:

> "As to the rights of the City and of the public, in contract rates, WHERE THE STATE HAS NOT INTERPOSED ITS AUTHORITY, see Columbus Railway, Power & Light Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. ed. 669; Miami Gas Co. v. Highleyman, 81 South. 775; City of Manitowoc v. Manitowoc & N. Traction Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056. * * * In the exercise of the power expressly recognized in Section 30, Art. 16 of the Constitution, to PASS LAWS upon the sub-

ject, the legislature enacted statutes as shown by the titles" (Acts providing for the regulation of street and other railroads).

In Town of Brooksville v. Florida Telephone Co., 81 Fla. 436, 88 So. 307, a suit to enjoin the telephone company from charging more than the franchise rate, where such increase had been authorized by the Railroad Commission, the Court said:

> "By Chapter 6525 power is given to the Railroad Commission to regulate rates, tolls, contracts and charges of telephone companies doing business in the State. That the business of the defendant is so affected by public interest as to permit its reasonable regulation by public authority is not disputed. This Court has held that rates or tolls to be charged by a public service corporation for services rendered, fixed by a municipality by ordinance as an incident to the granting of a franchise to it by such municipality ARE SUBJECT TO LEGISLATIVE CONTROL."

This Court, in adopting the construction of this section by the Supreme Court of Florida, in Tampa Waterworks Co. v. Tampa, 199 U. S. 341, 26 Sup. Ct. Rep. 23, where the Florida legislature had provided for the regulation of water rates, said:

> "A natural method of preventing excessive charges is the passage by the city or town within which the services are performed of ordinances establishing reasonable rates and punishing non-compliance. Therefore the power to prevent excessive charges, given to the legislature, properly was exercised by a law granting cities authority to pass ordinances of the kind supposed."

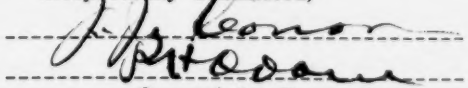
When the legislature does exercise the power vested in it by Section 30 of Article 16 of the Florida

Constitution and by laws provide for the regulation of the rates covered by a particular contract, then the power and the duty to regulate such rates are reciprocal.

And, while it is true that the power to regulate such rates cannot be bartered away or defeated by contract, the distinct holding of the Florida decisions has been that contracts fixing rates to be charged by public utility companies are made with the expectant possibility that the legislature will pass laws providing for the regulation of the rates covered by the contract; but until the legislature does pass such laws and thereby provide for the regulation of such rates, the contract is a valid and binding obligation. This construction places contracts as to the particular public utility, where the legislature has not interposed its authority within the rule laid down in proposition (b) of Southern Iowa Electric Co. v. Chairton, Supra. See cases cited in paragraph 7 of Reply.

It is respectfully submitted that the writ of Certiorari from this Court to the Supreme Court of Florida to review the decision of that Court in this case would involve the construction of the Constitution of the State of Florida adverse to the construction placed upon it by the highest tribunal of the State. And as it is said in Tampa Waterworks Co. v. Tampa, 199 U. S. 341, 26 Sup. Ct. Rep. 23, "we have yielded to the judgment of the state court upon more doubtful questions than this."

Respectfully submitted,



Counsel for Respondent.

# SOUTHERN UTILITIES COMPANY *v.* CITY OF PALATKA.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 339. Argued April 27, 1925.—Decided May 11, 1925.

1. An agreement of a public utility with a city to observe specified rates remains binding even after the rates become unremunerative, if the contract does not lack mutuality. P. 233.
2. The fact that the state legislature has power to regulate the rates does not deprive the contract between the utility and the city of mutuality. *Id.*

86 Fla. 583, affirmed.

CERTIORARI to a decree of the Supreme Court of the State of Florida, affirming a decree enjoining the petitioner from increasing its rates for electric lighting.

*Mr. William L. Ransom*, with whom *Messrs. W. B. Crawford* and *J. T. G. Crawford* were on the briefs, for petitioner.

*Mr. P. H. Odom*, with whom *Mr. J. J. Canon* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The City of Palatka brought this bill to restrain the petitioner, the Southern Utilities Company, from charging more than ten cents per kilowatt, meter measurement, for commercial electric lighting in the city. It alleged a contract in the grant of the petitioner's fran-

chise by which the petitioner was bound not to charge more than that sum. The defendant pleaded that in present circumstances the rate prescribed in the ordinance granting the franchise was unreasonably low and that to enforce it would deprive defendant of its property without due process of law contrary to the Constitution of the United States. The plea was overruled and defendant having declined to plead further a decree was entered for the plaintiff by the Circuit Court for Putnam County which subsequently was affirmed by the Supreme Court of the State. 86 Fla. 583.

The Supreme Court held that the City had power to grant the franchise and to make the contract and that it had no power of its own motion to withdraw, but it concedes the unfettered power of the legislature to regulate the rates. On that ground the defendant contends that there is a lack of mutuality and therefore that it is free and cannot be held to rates that in the absence of contract it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the Company in consideration of the grant of the franchise might not bind the Company in some cases, even if it left the City free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. *Georgia Railway & Power Co.* v. *Decatur,* 262 U. S. 432, 438. *Opelika* v. *Opelika Sewer Co.,* 265 U. S. 215, 218. Such a notion logically carried out would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain. There is nothing in this decision inconsistent with *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539; *San Antonio* v. *San Antonio Public Service Co.,* 255 U. S. 547 and *Ortega Co.* v. *Triay,* 260 U. S. 103.

*Decree affirmed.*